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No. 85-

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

BURLINGTON NORTHERN, INC.,
Petitioner,

v.

JACK D. ANDERSON,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MONTANA

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QUESTIONS PRESENTED

1. Where a collective bargaining agreement seeks to prevent double-recovery by providing that medical expenses previously paid by a railroad to an injured employee through an industry plan shall be offset against any damages awarded for such expenses in an action under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. §§ 51-60, does such an agreement unlawfully "exempt [the railroad] from . . . liability" as proscribed by Section 5 of that Act?

2. Where a trial judge in an FELA action excludes evidence proffered by a defendant railroad concerning the income taxes payable on plaintiff's lost earnings and refuses to instruct the jury, upon request, that the award of damages to plaintiff is not subject to income taxation, does *Norfolk & Western Railway v. Liepelt*, 444 U.S. 490 (1980), require reversal?

PARTIES TO THE PROCEEDINGS

Jack D. Anderson is the respondent/plaintiff.

As a result of a corporate reorganization, petitioner/defendant Burlington Northern, Inc. is now known as Burlington Northern Railroad Company. The petitioner's parent corporation created in that reorganization is now called Burlington Northern, Inc. Burlington Northern Railroad Company's partially owned subsidiaries and affiliates are as follows:

Burlington Northern Railroad Company:

The Belt Railway Company of Chicago
Camas Prairie Railroad Company
Davenport, Rock Island and
North Western Railway Company
The Denver Union Terminal Railway Company
Houston Belt & Terminal Railway Company
Iowa Transfer Railway Company
Kansas City Terminal Railway Company
Keokuk Union Depot Company
The Lake Superior Terminal and
Transfer Railway Company
Longview Switching Company
The Minnesota Transfer Railroad Company
Paducah & Illinois Railroad Company
Portland Terminal Railroad Company
The Saint Paul Union Depot Company
Terminal Railroad Association of St. Louis
Trailer Train Company
The Wichita Union Terminal Railway Company
Winona Bridge Railway Company

The El Paso Company:

El Paso Natural Gas Company:

El Paso Development Company:

Lake Country Windjammer, Inc.:

Adams Canyon Ranch
Santa Paula Farms

El Paso Hydrocarbons Company:

Minera San Pedro Corralitos, S.A.

Meridian Oil Holding Inc.:

Meridian Oil Inc. (formerly Mileston Petroleum Inc.):

Butte Pipe Line Company
Portal Pipe Line Company

New Mexico and Arizona Land Company:

NZ Development Corp.
NZ Properties, Inc.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF AUTHORITIES	vii
OPINIONS BELOW	1
JURISDICTIONAL STATEMENT	1
STATUTES AND REGULATIONS INVOLVED	2
STATEMENT OF THE CASE	2
I. FACTUAL BACKGROUND	3
II. TRIAL COURT PROCEEDINGS	4
III. MONTANA SUPREME COURT DECISION	6
REASONS FOR GRANTING THE WRIT	8
I. THE DECISION BELOW, THAT SECTION 5 INVALIDATES A COLLECTIVE BARGAINING AGREEMENT REQUIRING SET-OFF OF PRIOR PAYMENTS, BRINGS TO A HEAD A SERIOUS ISSUE OF FELA POLICY ON WHICH THE LOWER COURTS ARE IN CONFLICT	8
A. Background Of The Problem: Railroad Payment Of Medical Expenses Incurred By Injured Employees	8
B. The Conflicting Rulings On The Validity Of Collectively Bargained Set-Offs Create An Intolerable Dilemma For The Railroads	13
C. The Opinion Below, And Similar Decisions, Completely Misconstrue Section 5 Of The FELA	15

TABLE OF CONTENTS—Continued

Page

D. This Case Presents A Serious Issue Of FELA Policy Requiring The Court's Guidance 20

II. THE DECISION BELOW FAILS TO FOLLOW THIS COURT'S HOLDINGS IN *LIEPELT* AND EXEMPLIFIES A GROWING CONFLICT AMONG APPELLATE COURTS AS TO THE PREJUDICIAL IMPACT OF A FAILURE TO INSTRUCT A JURY ON THE TAX CONSEQUENCES OF AN FELA DAMAGE AWARD 22

A. The Montana Supreme Court's Harmless Error Treatment Of The Denial Of A Requested *Liepelt* Nontaxability Instruction Conflicts With Numerous Federal And State Appellate Decisions 23

B. The Decision Below Contravenes This Court's Other Holding In *Liepelt* Concerning The Use Of Income Tax Evidence To Compute Lost Earnings 27

C. These Damages Questions Require Immediate Clarification By The Court Due To Their Recurring Nature In FELA Actions 28

CONCLUSION 30

APPENDIX 1a

TABLE OF AUTHORITIES

CASES Page

Alessi v. Raybestos—Manhattan, Inc., 451 U.S. 504 (1981) 15
Anderson v. Union Oil Co., 49 Cal. App. 3d 968, 123 Cal. Rptr. 191 (1975) 15
Bay v. Western Pacific Railroad, 595 F.2d 514 (9th Cir. 1979) 16
Blake v. Delaware & Hudson Railway, 484 F.2d 204 (2d Cir. 1973) 10, 12, 14, 18, 19
Burlington Northern, Inc. v. Boxberger, 529 F.2d 284 (9th Cir. 1975) 25, 28
Burlington Northern, Inc. v. Lester, 48 Or. App. 579, 617 P.2d 906 (1980) 18
Caribe Tugboat Corp. v. Duffy, 427 So.2d 227 (Fla. Dist. Ct. App. 1983), *cert. denied*, 464 U.S. 1041 (1984) 26
Cazad v. Chesapeake & Ohio Railway, 622 F.2d 72 (4th Cir. 1980) 25
Chicago & Alton Railroad v. Wagner, 239 U.S. 452 (1915) 19
Chicago & North Western Railway v. Davenport, 205 F.2d 589 (5th Cir. 1953), *cert. denied*, 346 U.S. 930 (1954) 18
Chicago & North Western Railway v. United Transportation Union, 402 U.S. 570 (1971) 8
Clark v. Burlington Northern, Inc., 726 F.2d 448 (8th Cir. 1984) 11, 13, 18
Crabtree v. St. Louis—San Francisco Railway, 411 N.E.2d 19 (Ill. App. Ct. 1980) 25
Dennis v. Blanchfield, 428 A.2d 80 (Md. Ct. Spec. App. 1981), *aff'd as modified*, 438 A.2d 1330 (Md. 1982) 25
Diaz v. Indiana Harbor Belt Railroad, Civ No. H79-13 (N.D. Ind. Dec. 1, 1981) 11, 13
Duncan v. Thompson, 315 U.S. 1 (1942) 16, 20
Fanetti v. Hellenic Lines, 678 F.2d 424 (2d Cir. 1982), *cert. denied*, 463 U.S. 1206 (1983) 28
Faulkenberry v. Kansas City Southern Railway, 661 P.2d 510 (Okla.), *cert. denied*, 464 U.S. 850 (1983) 26

TABLE OF AUTHORITIES—Continued

Page

Flanigan v. Burlington Northern, Inc., 632 F.2d 880 (8th Cir. 1980), *cert. denied*, 450 U.S. 921 (1981) 25, 26
Flannery v. United States, 718 F.2d 108 (4th Cir. 1983), *cert. denied*, 104 S. Ct. 2679 (1984) 28
Folkestad v. Burlington Northern, Inc., No. CV-83-84-BLG (D. Mont. Sept. 30, 1985), *appeal pending*, Nos. 85-4280 & 4305 (9th Cir.) 14
Fulton v. St. Louis—San Francisco Railway, 675 F.2d 1130 (10th Cir. 1982) 25
Gaulden v. Southern Pacific Co., 78 F. Supp. 651 (N.D. Cal. 1948), *affirmed*, 174 F.2d 1022 (1949) 18
Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473 (1981) 23
Hall v. Minnesota Transfer Railway, 322 F. Supp. 92 (D. Minn. 1971) 10, 18
Haughton v. Blackships, Inc., 462 F.2d 788 (5th Cir. 1972) 11
Herbst v. Burlington Northern Railroad, CV-84-51-BLG (D. Mont. April 22, 1985) 14
Hogue v. Southern Railway, 390 U.S. 516 (1968) 18
Jones & Laughlin Steel Corp. v. Pfeifer, 462 U.S. 523 (1983) 23
Lang v. Texas & Pacific Railway, 624 F.2d 1275 (5th Cir. 1980) 25
Lopez v. Southern Pacific Transportation Co., 1 Civ. No. 40048 (Cal. Ct. App. 1977) 14
Lucht v. Chesapeake & Ohio Railway, 489 F. Supp. 189 (W.D. Mich. 1980) 14
Marlow v. Atchison, Topeka & Santa Fe Railway, 671 P.2d 438 (Colo. Ct. App. 1983) 26
Marynik v. Burlington Northern, Inc., 317 N.W.2d 347 (Minn. 1982) 26
Michigan Central Railroad v. Vreeland, 227 U.S. 59 (1913) 23
Nelson v. Penn Central Railroad, 415 F. Supp. 225 (N.D. Ohio 1976) 9, 10, 11
Norfolk & Western Railway v. Liepelt, 444 U.S. 490 (1980) ..... *passim*

TABLE OF AUTHORITIES—Continued

Page

O'Byrne v. St. Louis Southwestern Railway, 632 F.2d 1285 (5th Cir. 1980) 25
Oltersdorf v. Chesapeake & Ohio Railroad, 404 N.E.2d 320 (Ill. App. Ct. 1980), *cert. denied*, 450 U.S. 920 (1981) 25, 28
O'Tell v. New York, New Haven & Hartford Railroad, 236 F.2d 472 (2d Cir. 1956) 18
Paquette v. Atlanska-Plovidba, 701 F.2d 746 (8th Cir. 1983) 28
Patterson v. Norfolk & Western Railway, 489 F.2d 303 (6th Cir. 1973) 10
Philadelphia, Baltimore & Washington Railroad v. Schubert, 224 U.S. 603 (1912) 16, 19
Pittsburgh, Cincinnati, Chicago & St. Louis Railway v. Miller, 120 N.E. 706 (Ind. 1918) 19
Portier v. Texaco, Inc., 426 So.2d 623 (La. Ct. App. 1982), *cert. denied*, 433 So.2d 165 (La. 1983) 28
Rogers v. Chicago & North Western Transportation Co., 59 Ill. App. 3d 911, 375 N.E.2d 952 (1978) 11, 13
Russo v. Matson Navigation Co., 486 F.2d 1018 (9th Cir. 1973) 10
Seaboard Coast Line Railroad v. Yow, 384 So.2d 13 (Ala. 1980) 25
Sheff v. Conoco, Inc., 311 S.E.2d 14 (N.C. App. 1984) 25
Seifried v. Mon River Towing, Inc., 388 F. Supp. 233 (W.D. Pa. 1974) 20
Southern Pacific Transportation Co. v. Allen, 525 S.W.2d 300 (Tex. Civ. App. 1975) 10, 14
St. Louis Southwestern Railway v. Dickerson, —— U.S. ——, 105 S. Ct. 1347 (1985) 2, 23, 28
Stowell v. Simpson, 470 A.2d 1176 (Vt. 1983) 25
Thomas v. Humble Oil & Refining Co., 420 F.2d 793 (4th Cir. 1970) 11, 13, 14, 20
Thomas v. Penn Central Co., 379 F. Supp. 24 (W.D. Pa. 1974) 9, 11, 13, 14, 18
UMWA Health & Retirement Funds v. Robinson, 455 U.S. 562 (1982) 8

TABLE OF AUTHORITIES—Continued

Page

Urbaniak v. Erie Lackawanna Railway, 424 F. Supp. 981 (W.D.N.Y. 1977) 10, 12, 14
Vanskike v. ACF Industries, 665 F.2d 188 (8th Cir. 1981), *cert. denied*, 455 U.S. 1000 (1982) 26
Wagner v. Reading Co., 428 F.2d 289 (3d Cir. 1970) 11
Wilcox v. Clinchfield Railroad, 747 F.2d 1059 (6th Cir. 1984) 10

STATUTES

28 U.S.C. § 1257(3) (1982) 2
45 U.S.C. § 23 (1982) 4
45 U.S.C. §§ 51-60 (1982) 2
45 U.S.C. § 55 (1982) ..... *passim*
46 U.S.C. § 688 (1982) 10
30 Stat. 424 (1898) 19

LEGISLATIVE MATERIALS

H.R. Rep. No. 1386, 60th Cong., 1st Sess. (1908) 16
Regulation of Railway Rates: Hearings Before the Senate Comm. on Interstate Commerce, 58th Cong., 3d Sess. 3187 (1905) 19
40 Cong. Rec. 4607 (1906) 17
40 Cong. Rec. 7661 (1906) 17
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MISCELLANEOUS:

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TABLE OF AUTHORITIES—Continued

Page

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2 *Larson's Workmen's Compensation* § 97 (1984) .. 15
Opperthauser, *Collateral Source—Where Are We Now?*, 24(12) The Bulletin 7, 9 (Dec. 1978) 13
Restatement (Second) Torts, § 920A (1982) 9
Richter & Forer, *Federal Employers' Liability Act*, 12 F.R.D. 13 (1952) 20

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JACK D. ANDERSON,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MONTANA

The petitioner, Burlington Northern Railroad Company, formerly Burlington Northern, Inc. ("BN"), respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of Montana entered in this proceeding on November 26, 1985.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Montana is reported at 709 P.2d 641 (Mont. 1985), and appears in the Appendix ("App.") at 1a-12a. The judgment of the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Cascade, is unreported and appears in the Appendix at 15a.

JURISDICTIONAL STATEMENT

The judgment of the Supreme Court of the State of Montana was entered on November 26, 1985. A timely petition for rehearing was denied on December 19, 1985.

App. at 13a. By order of the Montana Supreme Court entered on December 24, 1985, a stay of enforcement of judgment was extended pending timely filing and disposition of this petition for writ of certiorari. App. at 14a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3) (1982).

STATUTES AND REGULATIONS INVOLVED

This case involves the Federal Employers' Liability Act ("FELA"), 45 U.S.C. §§ 51-60 (1982), and in particular Section 5 of that Act, 45 U.S.C. § 55, which is reproduced in the Appendix at 17a.

STATEMENT OF THE CASE

This case presents two categories of issues that arise during the pretrial and trial of a typical FELA damages case. Prior to trial, the trial court ruled that the plaintiff, an injured employee, could include medical expenses in the damages sought, but that the defendant railroad could not show that it had already paid the medical expenses either directly or through an industry indemnity plan. The defendant was thus denied an offset for the payments already made. During trial, the court ruled that the defendant could not cross-examine plaintiff's witnesses or introduce evidence on the impact of taxes in reducing plaintiff's estimated lost earnings. The court also denied the defendant's request for a jury instruction that any damages awarded to plaintiff would not be subject to federal and state income taxation. These rulings raise important and recurring questions of federal law with respect to the measurement of damages in FELA actions.[1]

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[1] Although the state and federal courts have concurrent jurisdiction for FELA actions, the rules of decision on liability and damages are questions of federal law. *See St. Louis Southwestern Railway v. Dickerson*, —— U.S. ——, ——, 105 S. Ct. 1347, 1348 (1985).

I. FACTUAL BACKGROUND

Jack D. Anderson, an engineer on one of BN's trains, suffered head and neck injuries when he apparently tripped and fell while entering the toilet compartment in his locomotive. As a result of these injuries, Mr. Anderson remained out of work for several months. During that time, he consulted with several doctors and ultimately had a surgical procedure known as a cervical fusion performed on his neck.

Mr. Anderson returned to work for BN as a locomotive engineer, but because of persistent stiffness and tension in his neck, he was unable to work shifts in excess of eight hours. Due to this diminished work capacity, he continued to miss some time on the job. At trial, there was conflicting testimony as to the permanence of Mr. Anderson's injuries and whether he would be able to perform his normal work duties as a locomotive engineer sometime in the future.

BN participates in a railroad industry Health and Welfare Plan administered by the Travelers' Insurance Company ("Travelers"). Pursuant to this plan, Mr. Anderson acknowledges, the medical expenses he incurred for treatment of the injuries sustained in his accident were paid by BN subject to partial reimbursement by Travelers, or paid directly by Travelers.[2] In a 1975 collective bargaining agreement, the railroads and unions specified that all of the payments for medical expenses for on-duty injuries under this plan would be set off against any future recovery by employees in FELA actions to prevent double-recovery:

> Benefits provided under the policy contract will be offset against any right of recovery the employee may have against the employing railroad for hospital, surgical, medical or related expenses of any kind specified in the policy contract.

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[2] *See* Brief of Plaintiff-Respondent Jack D. Anderson before the Montana Supreme Court, at 27-28.

Health and Welfare Agreement (Oct. 22, 1975), App. at 25a.[3] From the date of the accident until trial, Mr. Anderson received $11,795.25 for his medical expenses either directly from BN or through Travelers.

II. TRIAL COURT PROCEEDINGS

Mr. Anderson filed a complaint against BN on February 18, 1981, in the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Cascade, alleging that his injuries were caused by BN's violation of the FELA and the Boiler Inspection Act.[4] Prior to trial, plaintiff moved for partial summary judgment on the issue of liability under the Boiler Inspection Act. Over the objection of BN, that motion was granted by the trial court on June 8, 1984.[5] Accordingly, a trial was held solely on the issue of damages.

Before the damages trial began, the plaintiff submitted a motion *in limine* requesting an order from the court excluding certain facts from being discussed or offered into evidence in the presence of the jury. One of the specified items was "[t]hat the Burlington Northern and/or Traveler's Insurance paid part or all of the medical related charges Mr. Anderson incurred following the accident on February 28, 1978." BN resisted this motion, and after the submission of briefs and oral argument, the trial judge granted plaintiff's request.[6] As a result of

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[3] This Health and Welfare Agreement appeared as an exhibit to defendant's pre-trial Brief in Opposition to Plaintiff's Motion *In Limine*, and again in the Brief of Defendant-Appellant Burlington Northern Railroad Company before the Montana Supreme Court.

[4] 45 U.S.C. § 23 (1982).

[5] Although BN vigorously contested the trial court's granting of summary judgment on the issue of liability before the Supreme Court of the State of Montana, only the important damages issues are presented in this petition.

[6] The trial judge's ruling on this motion was given orally and not transcribed. However, it is undisputed that the motion was granted. App. at 10a.

this ruling, BN was precluded from offering any evidence as to the previous payment of Mr. Anderson's medical expenses.

The evidence submitted by plaintiff included the expert testimony of an economist concerning Mr. Anderson's lost earnings from the date of the accident until trial ($58,965), and the present value of the reduction in earnings capacity over the remainder of his working life ($181,504). Thus, plaintiff argued for a total of $240,469 in lost wages. BN presented an annuity broker who testified that plaintiff's lost future earnings could be fully compensated for by various annuity programs at a cost ranging between $63,775 and $90,673. Combined with its estimate of past lost earnings, BN argued at trial for a damage award as low as $115,000.

BN was prohibited, however, from submitting any evidence or cross-examining any witnesses to show that plaintiff's lost earnings should be reduced to reflect the effect of income taxes. In this regard, BN made a specific proffer at trial based upon Mr. Anderson's income tax returns for the years 1974 through 1982, which demonstrated that plaintiff's income tax liability amounted to approximately 17 percent of gross earnings. App. at 21a-22a. The judge rejected this evidence and refused to instruct the jury that the damages award should be based upon net earnings after the payment of income taxes. App. at 23a-24a. The railroad also requested an instruction based upon *Norfolk & Western Railway v. Liepelt*, 444 U.S. 490 (1980) ("*Liepelt*"), that "[a]ny award you make to plaintiff will not be subject to federal and state income taxes." App. at 18a. The trial court denied this request as well. App. at 23a-24a.

At the conclusion of the trial on damages, the jury returned a general verdict in favor of plaintiff in the amount of $195,000. App. at 15a. Under the court's jury instructions, this amount included compensation for actual

and future medical expenses, for past and future lost earnings, for any physical pain and emotional distress, and for the destruction, if any, of plaintiff's capacity to pursue an established course of life. App. at 19a-20a. However, the trial court directed an additional verdict of $11,795.25 for Mr. Anderson's medical expenses and entered a total judgment in the amount of $206,795.25. App. at 15a-16a. In effect, this judgment resulted in the triple payment by BN of the plaintiff's medical expenses: once through the Health and Welfare Plan; again through the jury's verdict; and a third time by addition of the expenses to the judgment.

III. MONTANA SUPREME COURT DECISION

On appeal, BN contested the trial court's refusal to permit any evidence or instruction on BN's payment of plaintiff's medical expenses, the court's refusal to allow evidence and instruct the jury on the effect of income taxes on plaintiff's lost earnings calculations, its failure to instruct the jury as to the nontaxability of any award for damages, as well as other claims of error not at issue in this petition. The Supreme Court of the State of Montana essentially denied petitioner's appeal by affirming the jury award of $195,000 to plaintiff. App. at 1a. The Montana Supreme Court did, however, reverse the trial court's directed verdict of an additional $11,795.25 for medical expenses, thus reducing the triple-recovery to double-recovery. App. at 12a.

The court recognized that the nontaxability instruction requested by BN was proper under *Liepelt*, but concluded that since the damages awarded by the jury were less than projected by plaintiff's witnessses, "any error in failing to give a nontaxability instruction is harmless." In so holding, the court below recognized that the "Federal Circuit Courts of Appeal are not in agreement on this issue." App. at 9a-10a. BN's claim of error concerning the admissibility, under *Liepelt*, of evidence as to the

effect of income taxes on plaintiff's lost earnings was not addressed in the court's opinion.

As to the double-payment of medical expenses, the court recognized that the Health and Welfare Agreement provided for a set-off of such benefits against later recovery at trial, but held that such negotiated agreements were invalid under Section 5 of the FELA. In the court's view, Section 5 "broadens application of the collateral source rule" in FELA cases involving an insurance plan, to allow set-off only of "the premiums, not what the premiums bought." Quoting a ruling by Chief Judge Battin of the federal district court in Montana, the court found that the 1975 Health and Welfare Agreement was an attempt to "[contract] away the benefits of [§ 5]." The court stated "[w]e will follow Judge Battin's interpretation of 45 U.S.C. § 55 and hold that the provision of the collective bargaining agreement relied on by BN is void." Accordingly, the court concluded, the medical benefits already paid to plaintiff were collateral and could not be set off from the damages award. App. at 10a-12a.

BN filed a timely petition for rehearing on these damages questions. The petition noted that the court had overlooked BN's arguments concerning the trial court's exclusion of relevant evidence as to the effect of income taxes on lost wages, and that its decision conflicted with numerous federal and state court decisions holding that the refusal to give a requested nontaxability instruction could not be harmless error. Petitioner also argued that the ruling of the court on medical expenses was inconsistent with several decisions from other jurisdictions allowing set-off on the ground that medical expense reimbursement plans, such as the Health and Welfare Plan involved in this case, were designed to indemnify the employers against liability and not as a source of compensation to the employees.

The petition for rehearing was denied without opinion; however, the court granted BN a stay of execution of the judgment pending the filing of this petition for certiorari.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW, THAT SECTION 5 INVALIDATES A COLLECTIVE BARGAINING AGREEMENT REQUIRING SET-OFF OF PRIOR PAYMENTS, BRINGS TO A HEAD A SERIOUS ISSUE OF FELA POLICY ON WHICH THE LOWER COURTS ARE IN CONFLICT

The decision below reflects the disarray and widespread confusion characterizing the current jurisprudence of Section 5 of the FELA. The Montana Supreme Court held that Section 5 prevents a railroad from setting off against an FELA award the medical expense payments previously made through a railroad-funded indemnity plan. In contrast, many other courts have permitted such a set-off of expenses paid under the same or similar plans.[7] The court's error is particularly significant, moreover, because the court used its flawed statutory analysis of Section 5 to invalidate an industry-wide collective bargaining agreement explicitly providing for and explaining the set-off. This result runs roughshod over well-established federal policy counseling against interference in the substantive terms of a collective bargaining agreement,[8] and is in conflict with decisions of several circuits and state courts. The decision below does damage to employer-employee relations in the railroad industry, unnecessarily singles out the railroads for anomalous treatment in the medical benefits area, and poses a substantial obstacle to resolution of the current liability insurance crisis.

A. Background Of The Problem: Railroad Payment Of Medical Expenses Incurred By Injured Employees

The controversy underlying this case arises because of the juxtaposition of the FELA and the long-standing rail-

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[7] *See* notes 16-18, *infra.*

[8] *See UMWA Health & Retirement Funds v. Robinson*, 455 U.S. 562, 576 (1982); *Chicago & North Western Railway v. United Transportation Union*, 402 U.S. 570, 579 n.11 (1971).

road practice of providing or paying for medical treatment when employees are injured on the job.[9] This practice assures that employees are treated promptly and adequately, and also that employees do not have to sue their employers in order to receive compensation for these significant expenses. Railroad employees thus rarely if ever bear any costs of treatment for on-duty injuries.

For the past thirty years, most of the nation's railroads have arranged for administration and payment of these medical expenses through a plan offered by the Travelers' Insurance Company—Group Policy No. GA-23,000.[10] The plan is financed by the railroads on a "premium-plus" basis;[11] that is, each railroad pays the insurance carrier an amount sufficient to cover its share of anticipated medical expenses, plus an additional amount as a fee for the company's services in administering the plan.[12] This system of financing medical care for employees is firmly established in the industry, and serves important interests of both the railroads and their employees. Payment of employees' medical expenses by a railroad under this program creates a recurring issue of double-recovery, however, when those employees also attempt to recover medical expenses as damages in FELA actions against the railroad.

Courts have analyzed the propriety of such recovery by applying the common law "collateral source" doctrine. Briefly stated, this doctrine provides that payments made by collateral sources (sources other than the defendant) covering elements of the plaintiff's injury are not credited against a judgment. *See* Restatement (Second) Torts, § 920A, comment (b) (1982). Whether payments made

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[9] *See Nelson v. Penn Central Railroad*, 415 F. Supp. 225, 227 (N.D. Ohio 1976); *Thomas v. Penn Central Co.*, 379 F. Supp. 24, 26 (W.D. Pa. 1974).

[10] *See Thomas v. Penn Central Co.*, 379 F. Supp. at 26.

[11] *See* App. at 25a-26a.

[12] *See Nelson v. Penn Central Railroad*, 415 F. Supp. at 226.

to a plaintiff-employee through an insurance policy procured by a defendant-employer are collateral, and thus not subject to set-off, depends on whether the employee actually bore the cost of the insurance in the form of a deduction or diversion from wages.[13]

The federal and state courts have had a surprising amount of difficulty determining how railroad-funded medical benefit plans should be characterized for purposes of the collateral source doctrine. Their rulings have been inconsistent and unpredictable even when the same plan, such as Group Policy No. GA-23,000, is in issue. Accordingly, employee-plaintiffs have frequently been allowed to recover damages from the railroad for medical expenses the railroad had already paid, a result at least two members of the Second Circuit have characterized as "shockingly unjust." [14]

The courts that allow double-recovery have reasoned that the medical expense plan was part of the employees' total compensation package, that it was paid for with funds that would otherwise have been paid to the employees as wages, and accordingly, that the railroads cannot take advantage of the medical expense payments to reduce their FELA liability.[15] Under this view Group

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[13] *Compare Nelson v. Penn Central Railroad*, 415 F. Supp. at 226-27, *with Hall v. Minnesota Transfer Railway*, 322 F. Supp. 92, 96 (D. Minn. 1971).

[14] *See Blake v. Delaware & Hudson Railway*, 484 F.2d 204, 207-08 (2d Cir. 1973) (Friendly and Lumbard, J.J., concurring).

[15] *See Wilcox v. Clinchfield Railroad*, 747 F.2d 1059 (6th Cir. 1984); *Patterson v. Norfolk & Western Railway*, 489 F.2d 303 (6th Cir. 1973); *Blake v. Delaware & Hudson Railway*, 484 F.2d 204 (2d Cir. 1973); *Urbaniak v. Erie Lackawanna Railway*, 424 F. Supp. 981 (W.D.N.Y. 1977); *Hail v. Minnesota Transfer Railway*, 322 F. Supp. 92 (D. Minn. 1971); *Southern Pacific Transportation Co. v. Allen*, 525 S.W.2d 300 (Tex. Civ. App. 1975). *See also Russo v. Matson Navigation*, 486 F.2d 1018 (9th Cir. 1973) (Jones Act).

The Jones Act incorporates Section 5 of the FELA, and cases under each statute therefore have precedential value for the other. 46 U.S.C. § 688 (1982).

Policy No. GA-23,000 and similar plans are not devices to indemnify the railroads for potential liability, but rather are collateral sources of income to the employees.

On essentially the same facts, other courts have reached the better-reasoned conclusion that such plans are, in fact, wholly funded by the railroads and not by diversion of employees' wages, and are simply arrangements for paying employee medical bills for which railroads may be liable under FELA.[16] It would be incongruous, these courts hold, to penalize an employer for planning in advance for such expenses and paying them promptly, while charging other employers that do not make such arrangements only once.[17] If necessary to prevent double-payment and double-recovery, therefore, these courts have directed that benefits previously paid under the medical plan should be deducted from any FELA damages awarded.[18]

This diversity of interpretation—often involving the same medical plan and the same underlying collective bargaining agreements—has caused great concern for both employers and employees. By the mid-1970's, it was apparent that without clearer evidence from the parties themselves of the true nature and source of the medical benefits received by railroad employees, the results of particular cases would continue to be unpredictable and in-

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[16] *See Wagner v. Reading Co.*, 428 F.2d 289 (3d Cir. 1970); *Thomas v. Humble Oil & Refining Co.*, 420 F.2d 793 (4th Cir. 1970); *Diaz v. Indiana Harbor Belt Railroad*, Civ. No. H 79-13 (N.D. Ind. Dec. 1, 1981) (App. at 41a); *Nelson v. Penn Central Railroad*, 415 F. Supp. 225 (N.D. Ohio 1976); *Thomas v. Penn Central Co.*, 379 F. Supp. 24 (W.D. Pa. 1974); *Rogers v. Chicago & North Western Transportation Co.*, 59 Ill. App. 3d 911, 375 N.E.2d 952 (Ill. App. 1978).

[17] *See Nelson v. Penn Central Railroad*, 415 F. Supp. at 226 (*citing Haughton v. Blackships, Inc.*, 462 F.2d 788, 791 (5th Cir. 1972)).

[18] *See also Clark v. Burlington Northern, Inc.*, 726 F.2d 448 (8th Cir. 1984).

consistent. In his concurring opinion in *Blake v. Delaware & Hudson Railway*, 484 F.2d 204 (2d Cir. 1973), Circuit Judge Friendly suggested the following:

> If the railroads wish to avoid the harsh result reached by the district court [allowing the plaintiff to recover for medical bills he did not pay], they can accomplish this by specific provision in the collective bargaining agreement.

Id. at 207. *See also Urbaniak v. Erie Lackawanna Railway*, 424 F. Supp. at 984.

Following this advice, BN and the other railroads represented by the National Carrier Conference Committee negotiated and entered into a Health and Welfare Agreement, dated October 22, 1975, with the major railroad employee unions. App. at 25a. Article III of that agreement provides as follows:

> The parties hereto do not intend that benefits provided under the policy contract will duplicate, in whole or in part, any amount recovered from either the employing railroad or a third party tort-feasor for hospital, surgical, medical or related expenses of any kind specified in the policy contract, and they intend that benefits provided under the policy contract will satisfy any right of recovery against the employing railroad for such benefits to the extent of the benefits so provided. Accordingly,
>
> (1) Benefits provided under the policy contract will be offset against any right of recovery the employee may have against the employing railroad for hospital, surgical, medical or related expenses of any kind specified in the policy contract.

Thus, the parties stated in the clearest possible terms their intention that the medical benefits provided under Group Policy No. GA-23,000 should be set off from any subsequent FELA award of medical expenses.

B. The Conflicting Rulings On The Validity Of Collectively Bargained Set-Offs Create An Intolerable Dilemma For The Railroads

After suggesting that the confusion in the area of set-offs for medical expenses could be resolved by specific contractual language indicating the parties' intent, the courts are now split on whether such collective bargaining agreements are valid under Section 5 of the FELA. This conflict relegates the parties back to the morass of varying, unpredictable treatment in different jurisdictions and, even worse, eliminates the only apparent means of resolving the confusion.

The disturbing trend towards challenging these agreements under Section 5 was noted as early as 1978.[19] Most courts that have considered the question enforce such agreements, viewing them as appropriate evidence that employees did not contribute to the plans and are therefore not entitled to double-recovery.[20] These courts properly hold that Section 5 does not prevent set-off of the payments made by the plan. As one court ruled, "so long as the employee received full compensation for his injuries," whether from the judgment or advance payment, Section 5 does not come into play. *Thomas v. Penn Central Co.*, 379 F. Supp. 24, 27 (W.D. Penn. 1974). A collective bargaining agreement that "provide[s] and pre-

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[19] *See* Opperthauser, *Collateral Source Rule—Where Are We Now?*, 24(12) The Bulletin 7, 9 (Natl. Assoc. of R. Trial Counsel, Dec. 1978).

[20] *See Clark v. Burlington Northern, Inc.*, 726 F.2d at 451; *Thomas v. Humble Oil & Refining Co.*, 420 F.2d at 794-95; *Diaz v. Indiana Harbor Belt Railroad*, slip op. at 4 (App. at 44a-45a); *Nelson v. Penn Central Railroad*, 415 F. Supp. at 226; *Thomas v. Penn Central Co.*, 379 F. Supp. at 27-28; *Rogers v. Chicago & North Western Transportation Co.*, 375 N.E.2d at 957-58.

serve[s]" an employee's rights is not a device to exempt the employer from any liability.[21]

The court below, however, followed a contrary interpretation of Section 5 and invalidated the 1975 Health and Welfare Agreement. First, the court ruled that the "proviso" in Section 5 "allows BN to 'set off only the premiums, not what the premiums bought.'" App. at 11a-12a. This concept was popularized by dictum in the Second Circuit *Blake* case and has been uncritically adopted by many courts as a bar to set-off of medical expense payments.[22] The court below further ruled that Section 5 "prevents BN from contracting away the benefits of [Section 5] as was attempted by the Health and Welfare Agreement between the union and the railroad." Thus, the Montana Supreme Court joined the federal district court in Montana and a California appellate court in finding that Section 5 precludes collectively-bargained set-off agreements.[23]

These conflicting rulings on whether contracts such as this Health and Welfare Agreement are void under Section 5 create an ironic and intolerable dilemma for railroad employers.[24] Financial assistance for medical ex-

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[21] *Thomas v. Humble Oil & Refining Co.*, 420 F.2d at 795; *see also Thomas v. Penn Central Co.*, 379 F. Supp. at 27 ("a method of obtaining funds to pay such liability [does] not fall within the prohibition of the Statute").

[22] *See, e.g., Lucht v. Chesapeake & Ohio Railway*, 489 F. Supp. 189, 190 (W.D. Mich. 1980); *Urbaniak v. Erie Lackawanna Railway*, 424 F. Supp. 981, 982 (W.D.N.Y. 1977); *Southern Pacific Transportation Co. v. Allen*, 525 S.W.2d 300, 307 (Tex. Civ. App. 1975).

[23] *Folkestad v. Burlington Northern, Inc.*, No. CV-83-84-BLG (D. Mont. Sept. 30, 1985), *appeal pending*, Nos. 85-4280 & 4305 (9th Cir.); *Herbst v. Burlington Northern Railroad*, CV-84-51-BLG (D. Mont. April 22, 1985) (App. at 32a); *Lopez v. Southern Pacific Transportation Co.*, 1 Civ. No. 40048 (Cal. App. 1977) (App. at 34a).

[24] Disallowance of the contractual set-off also increases the disparity between the railroad's employees and employees subject to

penses presents the potential for double exposure if the payments made are interpreted as fringe benefits under the collateral source rule. The industry has tried to resolve this problem logically and reasonably, as Circuit Judge Friendly suggested, through collectively bargained contracts such as the 1975 Health and Welfare Agreement. Some courts are now holding such contractual provisions invalid, although they are the best relevant evidence on the subject. The railroads are thus trapped; under the collective bargaining contracts with the rail employee unions they must continue to fund the massive health and welfare program, but they have no way to assure that they will not be required to pay for those expenses *twice*.

C. The Opinion Below, And Similar Decisions, Completely Misconstrue Section 5 Of The FELA

The decision of the Montana Supreme Court does not rest on a careful application of the collateral source rule to the facts of the case, but wholly on a legal interpretation of Section 5 of the FELA. The court's reasoning exemplifies the current confusion over the scope and purpose of this statute.

Section 5 renders void contracts, rules, regulations and devices whose "purpose or intent" is to enable a railroad to "exempt itself from any liability" created by FELA. 45 U.S.C. § 55 (App. at 17a). A proviso to this Section then states that, notwithstanding this general prohibition, a railroad may set off in any FELA suit "any sum it has

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workmen's compensation schemes. Outside the railroad industry, courts consistently enforce contractual set-off provisions designed to prevent double-recovery where an employee benefit plan supplements workmen's compensation. *See Anderson v. Union Oil Co.*, 49 Cal. App. 3d 968, 123 Cal. Rptr. 191 (1978); 2 *Larson's Workmen's Compensation* 18-9, 18-32-34 (1985); *cf. Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981) (set-off of workmen's compensation against retirement benefits sanctioned by ERISA).

contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee . . . on account of the injury or death for which said action was brought." *Id.* The two-part structure of Section 5—involving both a general prohibition and a proviso—was responsive to the dual objectives of the statute's proponents.

When FELA was under consideration near the turn of the century, Congress was concerned with railroad practices by which, it was believed, railroads were "exempting" themselves from liability for personal injuries. These practices included employment applications that contained releases from all personal injury claims, and agreements that made acceptance of medical treatment or benefits from "relief associations" established by the railroads a bar to further claims or suit.[25] To the extent of such release or bar, Section 5 rendered these arrangements void.[26]

Congress did not outlaw relief associations, however, or any other means by which the railroads might facilitate medical treatment for their employees. On the contrary, Congress encouraged such railroad efforts by allowing a credit for the benefits so provided:

> [I]n the event of an employee being injured, and the railroad corporation takes him to a hospital, paying perhaps hundreds and possibly thousands of dollars for his care, if afterwards action is resorted to to recover damages for that injury, the railroad corporation ought to have the benefit of that expense. . . . [I]f a railroad corporation expends money for the comfort and restoration of the health, or it may be the preservation of life of an injured employee,

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[25] *See* H.R. Rep. No. 1386, 60th Cong., 1st Sess. 6-9 (1906).

[26] *See Duncan v. Thompson*, 315 U.S. 1 (1942); *Philadelphia, Baltimore & Washington Railroad v. Schubert*, 224 U.S. 603 (1912); *Bay v. Western Pacific Railroad*, 595 F.2d 514, 516 (9th Cir. 1979).

> in the event of the employee being awarded damages in the courts, *the corporation should have the benefit of what it has contributed*: and that, I understand, is what this bill proposes to do.

40 Cong. Rec. 7662 (1906) (remarks of Mr. Gallinger) (emphasis added).[27] The proviso was therefore added to Section 5 in order to make clear that, even if a contract or device sought to exempt a railroad from liability in violation of Section 5, a railroad could still set off the benefits provided to the employee through such a contract or device.[28]

In this light, the Montana Supreme Court's analysis is deficient in three principal respects. First, the parties to the Health and Welfare Agreement are not "contract-

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[27] *See also* 42 Cong. Rec. 4527 (1908) (remarks of Mr. Dolliver); 40 Cong. Rec. 7662 (1906) (remarks of Mr. Foraker).

[28] *See* 42 Cong. Rec. 4427 (1908) (remarks of Mr. Sterling); 42 Cong. Rec. 4527 (1908) (remarks of Mr. Dolliver); 40 Cong. Rec. 4607 (1906) (remarks of Mr. Henry).

The legislature's intent was made particularly clear because an attempt to delete the proviso was debated on the Senate floor. *See* 40 Cong. Rec. 7661-62, 7696, 7915-20 (1906). The proponents of the proviso defended it on the ground, among others, that it would be grossly unfair to deny the railroads credit for the medical benefits provided, even if the railroad practices were objectionable in some other respect. *See, e.g.*, 40 Cong. Rec. 7696 (1906) (remarks of Mr. LaFollette). The proponents finally introduced a letter from the legislative representative of the railroad employee unions, H.R. Fuller, which stated:

> With regard to the amendment proposed by Senator Daniel, to strike out the proviso contained in section [5] of the employers' liability bill (H.R. 239), I am authorized on behalf of the 230,000 railroad employees who are seeking this legislation, and in whose interest it is supposed to be, to express the hope that this amendment will not be adopted for the following reasons: . . . [f]rom a moral standpoint, we think it only just and fair that the carrier should be given credit for such amounts as it has actually paid to an injured employee on account of such injury.

40 Cong. Rec. 7919-20 (1906). The effort to remove the proviso was then defeated. *Id.* at 7920.

ing away the benefits" of Section 5. The Health and Welfare Agreement is not a contract or device whose purpose or intent is to exempt the railroad from liability. As the Agreement itself makes clear, the railroads use the Health and Welfare Plan to meet their potential liability, that is, to pay expenses for which an employee may have a right of recovery under FELA. The plan is, in that sense, an indemnification plan. It is settled law that railroads may indemnify themselves in this way.[29]

The set-off prescribed by the Health and Welfare Agreement does not render the agreement void merely because it may have the effect of reducing a plaintiff's verdict. Section 5 has never prevented a set-off or reduction in damages when a railroad has paid amounts to an employee-plaintiff before judgment in connection with his claim or as an advance for sums that may be awarded in an FELA suit.[30] Set-offs of this kind do not leave any element of plaintiff's claim unrecompensed, they merely alleviate double-payment of any or all of the claim.

Second, the court's reading of the proviso (based on the dictum in *Blake*) turns the proviso on its head. Congress clearly intended to *assure* the railroads a set-off for medical benefits they provided, and did not intend that the proviso would be used to *deny* a set-off. The proviso was not intended to govern all set-off questions arising in FELA cases, but instead had a specific and more limited

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[29] *See Chicago & North Western Railway v. Davenport*, 205 F.2d 589, 594 (5th Cir. 1953) (*quoting Gaulden v. Southern Pacific Co.*, 78 F. Supp. 651, 655-56 (N.D. Cal. 1948), *affirmed*, 174 F.2d 1022 (9th Cir. 1949)), *cert. denied*, 346 U.S. 930 (1954); *Thomas v. Penn Central Co.*, 379 F. Supp. at 27; Comment, *The Construction of Indemnity Agreements Under the Federal Employers Liability Act: A Conflict of Public Policy and Contract Law*, 38 Md. L. Rev. 71, 99-100 (1978). *Cf. Hall v. Minnesota Transfer Railway*, 322 F. Supp. at 95.

[30] *See Hogue v. Southern Railway*, 390 U.S. 516, 518 (1968); *Clark v. Burlington Northern, Inc.*, 726 F.2d 448, 451 (8th Cir. 1984); *O'Tell v. New York, New Haven & Hartford Railroad*, 236 F.2d 472, 474-75 (2d Cir. 1956); *Burlington Northern, Inc. v. Lester*, 48 Or. App. 579, 617 P.2d 906, 909-10 (1980).

purpose: to preserve a set-off in cases where a railroad contract is void under the general prohibition, but the railroad has also "paid any benefit or any insurance *by virtue of such a contract.*" 42 Cong. Rec. 4427 (1908) (remarks of Mr. Sterling) (emphasis added).[31] Where, as here, the contract at issue is not void under the general prohibition of Section 5 as properly construed, the proviso is wholly irrelevant.

Lastly, even if the proviso is applied to this case, all the medical benefits at issue qualify for set-off. The phrasing of the proviso in terms of what the "carrier . . . contributed or paid" was not meant to distinguish between premiums paid and benefits bought, as suggested in *Blake* and repeated by other courts,[32] but to differentiate between the contributions made by employers and those made by employees.[33] Congress was informed in 1905 that employees were contributing as much as 80% of the funds used by the relief associations.[34] The drafters of Section 5 thus intended to deny the railroads credit for the portion of benefits that the *employees* had contributed

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[31] *See also Philadelphia, Baltimore & Washington Railroad v. Schubert*, 224 U.S. 603, 613 (1912); *Pittsburgh, Cincinnati, Chicago & St. Louis Railway v. Miller*, 120 N.E. 706, 708 (Ind. 1918).

[32] *See* note 22, *supra.*

[33] 40 Cong. Rec. 7917 (1906) (remarks of Messrs. Mallory and Daniel). *See Chicago & Alton Railroad v. Wagner*, 239 U.S. 452, 458 (1915).

During the debates, Congress also was reminded of the provisions of an earlier statute, the Arbitration Act, which made criminal any attempt by a railroad that had participated in a relief fund to claim a release from liability "beyond the proportion of the benefits arising from employer's contribution to such fund." *See* ch. 370, 30 Stat. 424 (1898); 40 Cong. Rec. 7916-17 (1906) (remarks of Mr. Daniel). The concept of differentiating benefits by the proportion of employer and employee contributions clearly underlay the discussion of Section 5.

[34] *See* 40 Cong. Rec. 7917 (1906) (remarks of Mr. Daniel); *Regulation of Railway Rates: Hearings Before The Senate Comm. on Interstate Commerce*, 58th Cong., 3d Sess. 3187 (1905) (testimony of H.R. Fuller).

but to allow a full and unrestricted offset for benefits derived from *employer* contributions.

Thus, the appropriate inquiry for a court facing this issue is the extent to which benefits are funded by the railroad. The Health and Welfare Agreement made clear that the benefits paid in this case were funded *solely* by the railroad.[35] Rather than heeding the Health and Welfare Agreement and permitting set-off as contemplated by the proviso, the court below ruled the Agreement invalid under the proviso. This profound subversion of the statute, induced by comments in earlier opinions, requires prompt reversal by this Court before it inspires further confusion.

D. This Case Presents A Serious Issue Of FELA Policy Requiring The Court's Guidance

The significance of the confusion surrounding Section 5 should not be underestimated. Section 5 is the centerpiece of this major statute—its "great catch-all safeguard." [36] As the Court has explained, "the scope of Section 5 is of fundamental importance in the administration of the Federal Employers' Liability Act." [37] Because Section 5 is incorporated in the Jones Act,[38] moreover, this controversy affects the shipping industry as well as the railroads.[39]

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[35] *See also* Article I of the Health and Welfare Agreement ("the railroads to pay the cost of providing such benefits"). App. at 25a-26a.

[36] Richter & Forer, *Federal Employers' Liability Act*, 12 F.R.D. 13, 52 (1952).

[37] *Duncan v. Thompson*, 315 U.S. 1, 5 (1942).

[38] *See* note 15 *supra*.

[39] *Compare Seifried v. Mon River Towing*, 388 F. Supp. 233 (W.D. Pa. 1974) (denying set-off of medical expense payments), *with Thomas v. Humble Oil & Refining Co.*, 420 F.2d 793 (4th Cir. 1970) (allowing set-off).

As outlined above, the results of particular cases involving medical benefit set-offs have been erratic and courts even disagree on the validity of collective bargaining agreements designed to alleviate this confusion. Because of the varying treatment of these contracts, employees of the same company, who are members of the same union, working in different states, face different damage regimes. Some will be able to double-recover and some will not. Such possibilities encourage forum-shopping, which is already a problem in FELA cases.[40] This result is clearly inequitable, and weakens the Congressionally mandated uniform rule of law under FELA.[41]

The issue presented here is a recurring one, involving a significant portion of the more than 3,000 FELA claims filed in federal and state courts each year.[42] The issue is an important one: in 1984, the most recent year for which statistics are available, petitioner alone paid over $6 million in premiums for the on-duty injury fund under Group Policy No. GA-23,000. In that same year, according to information gathered by the Association of American Railroads ("AAR"), the railroad industry paid out through GA-23,000 over $30 million for medical expenses incurred in connection with on-duty injuries. Moreover, with medical and insurance costs continuing to escalate, the potential impact of liability for *double* payment through FELA threatens to become even larger.[43]

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[40] *See* Herde, *FELA—Should It Be Abolished?*, 17 Forum 407, 411, 413-14 (1981).

[41] *See Norfolk & Western Railway v. Liepelt*, 444 U.S. at 493 n.5.

[42] That number is likely to grow if employees with negligible amounts of other damages but large medical expenses are now permitted to bring suit for those expenses, notwithstanding the 1975 Health and Welfare Agreement and others like it.

[43] The precedent of double-recovery set by the court below may also have severe implications for ongoing self-insurance efforts in

This double-payment/double-recovery issue is typically addressed (as in this case) before trial in motions *in limine*. Incorrect and unjust rulings on such motions may go unresolved for years or evade correction completely because of the high proportion of settlements in these cases. Because of the serious misconceptions of statutory purpose, continuing confusion in the courts over the proper handling of medical expense payments, and the huge monetary and practical significance of this issue for the railroad industry, petitioner respectfully requests that the Court take this opportunity to address the issue.

II. THE DECISION BELOW FAILS TO FOLLOW THIS COURT'S HOLDINGS IN *LIEPELT* AND EXEMPLIFIES A GROWING CONFLICT AMONG APPELLATE COURTS AS TO THE PREJUDICIAL IMPACT OF A FAILURE TO INSTRUCT A JURY ON THE TAX CONSEQUENCES OF AN FELA DAMAGE AWARD

The lower court's decision is one of a growing body of appellate cases in which this Court's decision in *Norfolk & Western Railway v. Liepelt*, 444 U.S. 490 (1980), has been ignored or circumvented. Although recognizing that the trial court's refusal to instruct the jury on the nontaxability of any damage award was contrary to *Liepelt*, the court below brushed the error aside as "harmless." Moreover, the court below entirely ignored the trial court's refusal to admit evidence as to the effect of income taxes on plaintiff's lost earnings, as required by *Liepelt*. The proliferation of decisions ignoring or undermining the holdings of *Liepelt* on these important

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the railroad and other industries. *See Congress Looks at Liability Insurers*, New York Times, Feb. 24, 1986 at D1, Col. 2. A company that finds its insurance costs too high may also be unwilling or unable to self-insure if benefits provided by such a program are susceptible to double-recovery in private lawsuits.

issues of FELA law requires prompt correction by this Court.

A. The Montana Supreme Court's Harmless Error Treatment Of The Denial Of A Requested *Liepelt* Nontaxability Instruction Conflicts With Numerous Federal And State Appellate Decisions

This Court has emphasized that damage awards in FELA cases should reflect the real economic loss of plaintiffs.[44] This principle was reaffirmed just last Term when the Court summarily reversed a lower court decision which had denied the right of a defendant in an FELA case to adduce evidence and have the jury instructed on the present value of future payments or other pecuniary benefits. *See St. Louis Southwestern Railway v. Dickerson*, 105 S. Ct. at 1348-49.

In *Liepelt*, this Court held that it was reversible error for a trial court (1) to refuse a jury instruction that damages for lost wages are not subject to federal and state income taxation, and (2) to deny a railroad defendant the opportunity to submit relevant evidence as to the effect of income taxes on a plaintiff's lost earnings. 444 U.S. at 493-98. *See also Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523, 534 (1983) (reaffirming *Liepelt* holdings); *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473 (1981) (extending *Liepelt* nontaxability instruction holding to Outer Continental Shelf Lands Act cases).

In its decision in this case, the Montana Supreme Court incorrectly adopted a "harmless" error standard for reviewing the failure of a trial court to give the requisite *Liepelt* instruction concerning the nontaxability of jury

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[44] In a wrongful-injury action by a railroad employee, the measure of recovery is the "damages as would have compensated him for his expense, loss of time, suffering and diminished earning power." *Michigan Central Railroad v. Vreeland*, 227 U.S. 59, 65 (1913).

awards in FELA cases.[45] The Montana Supreme Court's use of a harmless error standard contravenes this Court's express holding in *Liepelt*. In that case, the Appellate Court of Illinois was reversed for not finding error in the trial court's refusal to issue such an instruction upon request. The Court did not consider whether the lower court's error was harmless, instead holding:

> [I]t was error to refuse the requested instruction in this case. That instruction was brief and could be easily understood. It would not complicate the trial by making additional qualifying or supplemental instructions necessary. It would not be prejudicial to either party, but would merely eliminate an area of doubt or speculation that might have an improper impact on the computation of the amount of damages.

444 U.S. at 498. The failure to give a nontaxability instruction was found to be inherently prejudicial since it is impossible to determine whether a tax-conscious jury improperly increased an award under the mistaken belief that its verdict would be subject to income taxation. In fact, although the *Liepelt* Court speculated as to whether the failure to give a nontaxability instruction may have led to a higher verdict, it specifically stated that "[w]hether or not this speculation is accurate," a remand was required for a new damages trial. 444 U.S. at 497-98.

As the Montana Supreme Court recognized, its decision added to an existing conflict among appellate courts with respect to the use of a harmless error standard. Several federal circuit courts require a new trial on damages

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[45] Defendant's requested jury instruction No. 28 stated:

> Any award you make to plaintiff will not be subject to federal or state income taxes. You should not consider such taxes in arriving at the amount of your award.

App. at 18a.

whenever a lower court refuses a requested instruction on the nontaxability of jury awards in an FELA case. In remanding such a case for a new trial, the Fifth Circuit has expressly held that "[r]egardless of whose [damage] figures are the more correct, *Liepelt* did not require the demonstration of an erroneously inflated award in order to find reversible error in the denial of the requested instruction." *O'Byrne v. St. Louis Southwestern Railway*, 632 F.2d 1285, 1287 (5th Cir. 1980). *See also Lang v. Texas & Pacific Railway*, 624 F.2d 1275, 1278-80 (5th Cir. 1980). The Fourth, Ninth and Tenth Circuits have also summarily reversed trial court judgments, without any analysis of the nature or extent of the error, for failing to give a requested nontaxability instruction.[46] In addition, a number of state appellate courts have held that such a refusal requires a new trial on damages.[47]

On the other hand, one federal circuit court and several state appellate courts have applied a harmless error standard similar to the one adopted in Montana. In *Flanigan v. Burlington Northern, Inc.*, 632 F.2d 880, 889-90 (8th Cir. 1980), *cert. denied*, 450 U.S. 921 (1981), the Eighth Circuit held that the refusal of a trial court to give a requested *Liepelt* nontaxability in-

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[46] *See Fulton v. St. Louis—San Francisco Railway*, 675 F.2d 1130, 1134-35 (10th Cir. 1982); *Cazad v. Chesapeake & Ohio Railway*, 622 F.2d 72, 75-76 (4th Cir. 1980); *Burlington Northern, Inc. v. Boxberger*, 529 F.2d 284, 295-98 (9th Cir. 1975).

[47] *See Sheff v. Concco, Inc.*, 311 S.E.2d 14, 18-19 (N.C. App. 1984); *Oltersdorf v. Chesapeake & Ohio Railroad*, 404 N.E.2d 320 (Ill. App. Ct. 1980), *cert. denied*, 450 U.S. 920 (1981); *Crabtree v. St. Louis—San Francisco Railway*, 411 N.E.2d 19, 23-25 (Ill. App. Ct. 1980); *Seaboard Coast Line Railroad v. Yow*, 384 So.2d 13 (Ala. 1980); *cf. Stowell v. Simpson*, 470 A.2d 1176 (Vt. 1983) (tort action); *Dennis v. Blanchfield*, 428 A.2d 80, 86-87 (Md. Ct. Spec. App. 1981), *aff'd as modified*, 438 A.2d 1330 (Md. 1982) (medical malpractice).

struction was harmless error where the defendant was not precluded from offering relevant evidence of net earnings after taxes and where there was no evidence that the jury inflated its award on the erroneous belief that the verdict would be taxable. *See also Vanskike v. ACF Industries*, 665 F.2d 188, 206-07 (8th Cir. 1981), *cert. denied*, 455 U.S. 1000 (1982). The reasoning in *Flanigan* has been followed by several state appellate courts.[48]

It is therefore apparent that a genuine conflict currently exists among the federal and state appellate courts as to the correct standard for reviewing a trial court's refusal to give a requested *Liepelt* nontaxability instruction. For whatever reason, a disturbing number of trial judges are still denying requested jury instructions on the nontaxability of damage awards, while several reviewing courts continue to speculate as to the possible effects such rulings have had on verdicts. As this case aptly reveals, it is virtually impossible to determine the basis for most jury awards, especially when conflicting evidence is presented as to the amount of the pecuniary loss to the plaintiff.[49] Absent further direction from this Court, this important issue of FELA law will remain in a state of disarray.

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[48] *See Faulkenberry v. Kansas City Southern Railway*, 661 P.2d 510, 512-13 (Okla.), *cert. denied*, 464 U.S. 850 (1983) (pre-*Liepelt* trial); *Marlow v. Atchison, Topeka & Santa Fe Railway*, 671 P.2d 438, 442-43 (Colo. Ct. App. 1983); *Caribe Tugboat Corp. v. Duffy*, 427 So.2d 227 (Fla. Dist. Ct. App. 1983) (per curiam), *cert. denied*, 464 U.S. 1041 (1984); *Marynik v. Burlington Northern, Inc.*, 317 N.W.2d 347, 351 (Minn. 1982).

[49] The Montana Supreme Court asserted that the absence of a *Liepelt* instruction was harmless on the assumption that the jury discounted plaintiff's claimed damages of $240,000 in reaching a verdict of $195,000. It is equally plausible, however, that the jury *inflated* BN's annuity evidence as to plaintiff's actual economic loss of only $115,000.

B. The Decision Below Contravenes This Court's Other Holding In *Liepelt* Concerning The Use Of Income Tax Evidence To Compute Lost Earnings

As noted earlier, the Court held in *Liepelt* that it is reversible error for a trial court to exclude evidence of the income taxes payable on past and estimated future earnings claimed as damages. 444 U.S. at 493-96. In this case, the trial court refused to admit tax returns showing the amount of income taxes actually paid by plaintiff, denied BN the opportunity to cross-examine plaintiff's economist on the impact of income taxes on his lost wage calculations,[50] and refused to instruct the jury concerning the appropriateness of basing an award on after-tax net earnings.[51] App. at 21a-24a. The Montana Supreme Court nevertheless affirmed the lower court's judgment, twice failing even to address this aspect of petitioner's appeal.

The exclusion of such evidence in an FELA action is intrinsically prejudicial. As this Court stated in *Liepelt*:

> It is [plaintiff's] after-tax income, rather than his gross income before taxes, that provides the only realistic measure of his ability to support his family. It follows inexorably that the wage earner's income tax is a relevant factor in calculating the monetary loss suffered by his dependents when he dies.

444 U.S. at 493-94. Since *Liepelt*, many federal and state courts have held that such a refusal to allow the introduction of a wage earner's tax liability constitutes reversible error requiring a remand for a new damages

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[50] BN offered to prove that plaintiff's income taxes paid between 1974 and 1982 constituted 17 percent of his gross earnings during that period. Such an amount cannot be deemed *de minimis*.

[51] Petitioner's requested jury instruction no. 17 read as follows:

> In determining your verdict, you should calculate any past loss of earnings on the basis of his net earnings, *i.e.*, the earnings left to him after the payment of income taxes.

App. at 18a.

trial.[52] In addition, at least one state appellate court has summarily reduced an inflated damage award when the trial court refused to consider the tax liability of a plaintiff.[53]

The Montana Supreme Court has disregarded the holdings in *Liepelt* in a way that no other court has previously done. Its combined rulings permitted the jury to consider only evidence of *gross* earnings (contrary to *Liepelt*) and then to render a verdict without any awareness that the judgment would be tax free (again contrary to *Liepelt*). The decision below is so clearly wrong as to warrant summary reversal.[54] In any event, absent this Court's review of the decision below, other reviewing courts may deem it acceptable to disregard the teachings of *Liepelt*, giving rise to the kind of inflated damage awards which the *Liepelt* Court was attempting to prevent.

C. These Damages Questions Require Immediate Clarification By The Court Due To Their Recurring Nature In FELA Actions

The Montana Supreme Court's decision on these tax questions could have serious implications for the thousands of FELA claims brought in the federal and state courts each year. In 1985, 2,221 FELA actions were brought in the federal courts. *See* Annual Report of the Director of

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[52] *See, e.g., Flannery v. United States*, 718 F.2d 108, 111 (4th Cir. 1983), *cert. denied*, 104 S. Ct. 2679 (1984); *Fanetti v. Hellenic Lines*, 678 F.2d 424, 431 (2d Cir. 1982), *cert. denied*, 463 U.S. 1206 (1983); *Oltersdorf v. Chesapeake & Ohio Railroad*, 404 N.E.2d at 324-25; *see also Burlington Northern, Inc. v. Boxberger*, 529 F.2d at 291-95; *compare Paquette v. Atlanska-Plovidba*, 701 F.2d 746 (8th Cir. 1983).

[53] *See Portier v. Texaco, Inc.*, 426 So.2d 623, 630 (La. Ct. App. 1982), *cert. denied*, 433 So.2d 165 (La. 1983).

[54] *See, e.g., St. Louis Southwestern Railway v. Dickerson*, 105 S. Ct. 1347.

the Administrative Office of the United States Courts, at Table C2 (1985). The AAR has estimated that approximately an additional one thousand FELA cases are brought each year in the state courts. In 1984 alone, the railroads collectively paid over one half billion dollars for FELA death and personal injury claims.[55] Virtually every one of these cases involved claims for lost earnings.

As the court below acknowledged, the federal and state courts are not deciding FELA claims in a uniform manner as contemplated by the statute.[56] In those jurisdictions, like Montana, which sanction the disallowance of probative evidence and appropriate jury instructions as to the effect of income taxes on FELA damage awards, plaintiffs will continue to be overcompensated for their personal injuries. Such unfair verdicts, if allowed to stand, most assuredly will fuel the liability explosion which has gripped this country in recent years. In order to ensure that FELA personal injury verdicts remain fair to both the railroads and their employees, a definitive ruling from this Court is required on the consequences of such erroneous rulings.

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[55] Through surveys of its member railroads, the AAR has determined that in 1984 the industry collectively paid out $500,418,048 to employees for FELA death and personal injury claims.

[56] *See* note 41 and accompanying text, *supra*.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be issued to review the judgment and opinion of the Supreme Court of the State of Montana.

Respectfully submitted,

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Supreme Court, U.S.
FILED
MAR 19 1986
JOSEPH F. SPANIOL, JR.
CLERK

85-1544

No. 85-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

BURLINGTON NORTHERN, INC.,
Petitioner,

v.

JACK D. ANDERSON,
Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MONTANA

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INDEX TO APPENDIX

Page

Opinion of the Supreme Court of the State of Montana in *Anderson v. Burlington Northern, Inc.*, 709 P.2d 641 (Mont. 1985) 1a

Order denying petition for rehearing (Mont. S. Ct. December 19, 1985) 13a

Order to extend stay of enforcement of judgment (Mont. S. Ct. December 24, 1985) 14a

Judgment in the District Court of the Eighth Judicial District of the State of Montana in and for the County of Cascade (July 3, 1984) 15a

Statutes:

45 U.S.C. § 55 (1982) 17a

Defendant's Proposed Jury Instruction Nos. 17 and 28 (June 25, 1984) 18a

Court Jury Instruction No. 12 ..... 19a

Excepts from the trial transcript:

Pages 403-406 ..... 21a

Pages 654-656 ..... 23a

Health and Welfare Agreement (October 22, 1975) (Attached to Defendant's Brief in Opposition to Plaintiff's Motion *In Limine*) 25a

Unreported cases:

a. *Herbst v. Burlington Northern, Inc.*, CV-84-51-BLG (D. Mont. April 22, 1985) 32a

b. *Lopez v. Southern Pacific Transportation Co.*, 1 Civ. No. 40048 (Cal. App. 1977) 34a

c. *Diaz v. Indiana Harbor Belt Railroad*, Civ. No. H 79-13 (N.D. Ind. Dec. 1, 1981) (Magistrate Moody) 41a

IN THE SUPREME COURT
OF THE STATE OF MONTANA

No. 84-485

JACK D. ANDERSON,
Plaintiff and Respondent,

v.

BURLINGTON NORTHERN, INC.,
a Delaware Corporation,
Defendant and Appellant.

Appeal from the District Court of the
Eighth Judicial District, In and For the
County of Cascade

Submitted: September 20, 1985

Filed: November 26, 1985

Before: TURNAGE, Chief Justice, HARRISON, HUNT, WEBER, MORRISON and GULBRANDSON, Junior Justices, and GREEN,* District Judge.

TURNAGE, Chief Justice.

This is an appeal from the District Court's granting of partial summary judgment on liability and jury verdict on damages in a personal injury action brought pursuant to the Federal Employers' Liability Act and the Federal Boiler Inspection Act.

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* Sitting in place of Mr. Justice SHEEHY, who deems himself disqualified.

We considered the following issues on appeal:

1. Whether the District Court erred in granting respondent's motion for partial summary judgment on the violation of the Boiler Inspection Act.

2. Whether the District Court erred by improperly removing the issues of causation from the jury.

3. Whether the District Court erred in denying appellant's challenge for cause to juror Dailey.

4. Whether the District Court committed reversible error in refusing to instruct the jury regarding the nontaxability of any award made by the jury to injured railroad employee.

5. Whether the District Court erred in instructing the jury to include medical expenses incurred by respondent in its damages award even though some or all of those expenses had been covered by appellant's insurer.

6. Whether the District Court erred in adding a directed verdict for medical expenses to the jury award when the jury had been instructed to include medical expenses in its award.

We affirm the judgment of the District Court on all issues except the sixth. We reverse the District Court's directed verdict which added $11,795.25 to the jury verdict.

Respondent, Jack D. Anderson, was a locomotive engineer employed by the appellant, Burlington Northern Railroad Company (BN), working on a train assigned to snowplow service north and west of Saco, Montana. During a lull in the operations, respondent entered a toilet compartment at the rear of the locomotive. The toilet compartment is a small room about six feet wide by seven feet long used for storage of tools and equipment as well as providing toilet facilities for the crew. The compartment is dimly lit.

Respondent claims that as he walked into the compartment, he tripped and stumbled head-on into the sandbrum on the opposite wall of the compartment. Without looking to see what may have caused his fall, respondent left the compartment and informed other crew members of the accident. The other crew members then checked the compartment and found a pilot, an iron skirt which serves as a cow catcher, on the floor of the compartment. Apparently, the pilot had been recently stored out-of-the-way in the compartment. The jerking from the snow-plowing operation jarred the pilot out to a point in front of the compartment entrance where respondent tripped.

As a result of the accident, respondent suffered from neck pain. He sought treatment from an orthopedic surgeon, Thomas Power, M.D., in Great Falls. A cervical sprain was diagnosed, and respondent was treated with rest, traction and physical therapy. Respondent continued to suffer from neck pain and went to an orthopedic surgeon in San Francisco, Arthur White, M.D. Dr. White diagnosed the injury as a herniated disc and performed a cervical fusion on August 1, 1978. The surgery relieved respondent's pain for awhile. However, the pain resumed and rendered the respondent incapable of working.

Respondent then brought this action in the Eighth Judicial District to recover damages for personal injuries sustained within the scope of his employment as a locomotive engineer for BN.

In the meantime, BN's insurer had paid respondent's medical expenses in accordance with a collective bargaining agreement. Respondent filed a motion in limine to prevent any mention of appellant's payment of the medical expenses during trial. Respondent maintained that the insured's payment of the medical expenses was a collateral source of no benefit to appellant. The District Court agreed and granted respondent's motion and directed a verdict in favor of respondent on his claim

for medical expenses. The District Court also granted respondent's motion for partial summary judgment holding that the pilot on the floor of the toilet compartment constituted a violation of the Boiler Inspection Act for which defendant was strictly liable. The issues of causation and damages were submitted to the jury. The jury returned a verdict for damages of $195,000 to which the directed verdict of $11,795.25 for medical expenses was added for a total judgment of $206,795.25. BN appeals that judgment.

Respondent's action is based upon violation by BN of two federal statutes known as the Boiler Inspection Act, 45 U.S.C. § 22 et seq., (a portion of the Safety Appliance Act) and the Federal Employer's Liability Act (FELA), 45 U.S.C. § 51 et seq. In particular, 45 U.S.C. § 23 provides:

> It shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate . . . that the same may be employed in the active service of such carrier without unnecessary peril to life or limb . . .

In *Callihan v. Burlington Northern, Inc.* (Mont. 1982), 654 P.2d 972, 975, 39 St.Rep. 2158, we followed the United States Supreme Court decision in *Lilly v. Grand Trunk R. Co.* (1943), 317 U.S. 481, 485, 63 S.Ct. 347, 87 L.Ed. 411, in holding that this section interacts with the FELA to impose absolute liability on anyone that violates it. *Callihan*, 654 P.2d at 975, also determined that recovery for a Boiler Inspection Act violation requires a showing of: (1) a violation of the Act, and (2) injury proximately caused by that violation.

I

Appellant here claims that whether or not the piece of pilot on the floor violated the Boiler Inspection Act was

a question of fact for the jury and that it was error for the District Court to grant summary judgment on that issue. A large iron object on the floor of a dimly lit walkway in a moving locomotive seems to us to involve "unnecessary peril to life or limb" so as to violate the Act, but without more this would be a conclusion for the jury to make. However, in this case we are not left to our own resources in construing the Act. The Federal Railroad Administration, Department of Transportation, has set the standard by imposing the following railroad locomotive safety regulation:

> Floors of cabs, passageways, and compartments shall be kept free from oil, water, waste or any obstruction that creates a slipping, tripping or fire hazard. Floors shall be properly treated to provide secure footing.

49 C.F.R. § 229.119(c).

There is uncontroverted evidence that there was a pilot in the walkway in violation of this rule. In *Lilly*, 317 U.S. at 488, 63 S.Ct. at 352, the United States Supreme Court, when faced with a similar rule, held that a rule adopted in exercise of the Interstate Commerce Commission's authority to set standards of compliance with the Boiler Inspection Act acquires the force of the law and becomes an integral part of the Act. Because the Federal Railroad Administration has taken over the functions of the Interstate Commerce Commission with respect to railroad safety, 49 U.S.C. § 1655(e) and (f), this holding is directly applicable to the instant case. BN, by violating a rule that was adopted in exercise of the Federal Railroad Administration's authority to set standards of compliance with the Boiler Inspection Act, has also violated the Act.

Appellant questions whether this rule was properly before the District Court. However, the rule was referred to in depositions presented with the motion for

summary judgment. Moreover, in *Lilly*, supra, the federal rule had not been called to the attention of the trial court. The Supreme Court held that it will take judicial notice of federal rules setting standards of compliance with the Boiler Inspection Act. *Lilly*, 317 U.S. at 488, 63 S.Ct. at 352. We will not ignore the federal rule now.

Even if there was no violation of the Act as a matter of law because of the federal regulation, the District Court could have found the violation issue proper for summary judgment because of BN's own safety rule No. 112 which was before the court. Rule No. 112 provides:

> To avoid stumbling, tripping, and falling, floors, gangways and steps of locomotives must be kept free of supplies, tools, and loose equipment.

Such a safety rule is strong evidence that a violation of that rule would present "unnecessary peril to life and limb." Because appellant has provided nothing to counter this evidence of a Boiler Inspection Act violation, summary judgment was appropriate.

II

The second prong of our test for recovery under the Boiler Inspection Act is whether the violation of the Act proximately caused plaintiff's injury. *Callihan*, supra. BN argues that the District Court failed to properly consider the issue of causation. We disagree.

By granting summary judgment on liability, the District Court took the issue of whether BN's violation of the Boiler Inspection Act caused the accident from the jury. Appellant, however, claims that there was insufficient evidence to establish the cause of respondent's accident because respondent did not see what he tripped over and the other witnesses did not see the accident. Appellant then speculates that respondent may have tripped over something besides the pilot. However, we

follow the rule that inferences drawn from circumstantial evidence can be as probative as direct evidence. *Barich v. Ottenstror* (1976), 170 Mont. 38, 42, 550 P.2d 395, 397. Furthermore, the party opposing a motion for summary judgment on a record which reveals no issue of material fact must present facts of substantial nature, and conclusionary or speculative statements are insufficient to raise genuine issues of material fact. *Barich*, supra; Rule 56, M.R.Civ.P.

The depositions establish that respondent went into the toilet compartment and fell, hurting his head and shin. Respondent's co-workers saw him enter the compartment, heard a "thump" and a shout, saw respondent come out of the compartment, listened to respondent's immediate complaints, and immediately investigated the compartment where they found the pilot near the door. The obvious inference from this evidence is that respondent tripped over the pilot. Appellant only speculates that something else caused the accident. As such, the trial court was entitled to conclude that BN's violation of the Boiler Inspection Act in not keeping a walkway free of obstructions caused the accident.

Appellant also argues that the jury was improperly instructed on the issue of causation. The same argument that the jury failed to consider causation under similar facts to the instant case was considered by this Court in *Callihan*, supra. In *Callihan*, plaintiff injured his back when the seat he was sitting on in a BN locomotive broke. We held that the jury was properly instructed on the issue of causation where instructions clearly limited the award of damages to damages for injuries proximately caused by the accident. *Callihan*, 654 P.2d at 975. In the instant case, Court Instruction No. 7 stated:

> In this case, Plaintiff seeks damages under a law of the United States commonly called the Federal Boiler Inspection Act. It has been determined by

this Court that on February 28, 1978, at the time of the fall for which Jack Anderson seeks to recover, the Defendant, Burlington Northern, Inc., was in violation of the Federal Boiler Inspection Act, by reason of the presence of a piece of metal pilot in the entry way to the toilet compartment of Burlington Northern locomotive number 1820.

Therefore, the only issues for your consideration are:

(1) Whether Plaintiff was injured as a result of the accident occurring on February 28, 1978; and

(2) The amount of damages, if any, Plaintiff is entitled to receive for any injuries which you may find were caused by the accident of February 28, 1978.

Court Instruction No. 12 instructed the jury similarly. As such, the jury was not improperly instructed on the issue of causation.

III

Appellant specifies that the District Court erred in not disqualifying juror Dailey upon challenge for cause. We adhere to the rule that the trial court is in a better position to judge the prejudice of jurors and its findings and its decision will not be set aside unless the error is manifest or there is a clear abuse of discretion. *Liss v. Krejtel* (1973), 162 Mont. 144, 147, 509 P.2d 841, 843. The rule is the same where there has been the forced use of a peremptory challenge. *Abernathy v. Eline Oil Field Services, Inc.* (1982), 650 P.2d 772, 777, 39 St.Rep. 1688, 1696.

Here, during appellant's voir dire of prospective juror Dailey, Dailey revealed that he is a grain farmer that utilizes BN yearly to ship his grain. He stated that he felt BN was grossly overcharging for its services. Appellant challenged the juror for cause. The trial judge then questioned Dailey to determine if he held any feelings of animosity toward BN that would preclude him

from awarding damages fairly. Daily denied any such animosity, and the judge denied the challenge. While we think it may have been best to dismiss Dailey because other jurors were readily available, we can see no abuse of discretion.

IV

BN contends that the trial court erred in failing to instruct the jury on the nontaxability of any award made by the jury. We recently considered the same argument in *Dallas v. Burlington Northern, Inc.* (Mont. 1984), 689 P.2d 273, 277, 41 St.Rep. 1902, 1908. The Federal Circuit Courts of Appeals are not in agreement on this issue. See *Flanagan v. Burlington Northern, Inc.* (8th Cir.1980), 632 F.2d 880, 889, and *O'Byrne v. St. Louis Southwestern Ry.* (5th Cir.1980), 632 F.2d 1285, 1287. We will adhere to our holding in *Dallas*, 689 P.2d at 278, that in a case where the jury awards the exact amount of damages projected by the economist any error in failing to give a nontaxability instruction is harmless. This holding was based on the rationale that the jury clearly did not award a sum for some future tax obligation.

In the instant case, the jury awarded $195,000, or $45,000 *less* than $240,000 in damages projected by the economist. Therefore, by the rationale in *Dallas*, any error in failing to give the nontaxability instruction is harmless.

Having thus held, we are compelled to comment that in the future it would be better for a trial court to give a nontaxability instruction to the jury. Such an instruction is easily made and would remove any doubt as to whether the jury overcompensated plaintiff on the basis of an erroneous assumption that the judgment will be taxed. We make this comment because of trial courts' reliance on previous holdings by this Court that future income tax liability is an improper consideration in

formulating an award for loss of future earnings. See *Torchia v. Burlington Northern, Inc.* (1977), 174 Mont. 83, 96, 568 P.2d 558, 566; *McGee v. Burlington Northern, Inc.* (1977), 174 Mont. 466, 477, 571 P.2d 784, 791. Those holdings have been overruled by the United States Supreme Court in *Norfolk & Western Ry. v. Liepelt* (1980), 444 U.S. 490, 100 S.Ct. 755, 62 L.Ed.2d 689. After *Liepelt*, it is proper to give the nontaxability instruction.

V

The medical expenses Anderson incurred for treatment of the injuries he sustained in the February 28, 1978, accident were paid directly by Travelers' Insurance Company; or, they were paid by Burlington Northern and Burlington Northern was reimbursed by Travelers. Prior to trial, Anderson's motion in limine to prohibit BN from showing that BN or Travelers had paid these expenses was granted. BN claims that the trial court erred in excluding this evidence because that evidence shows Anderson incurred no loss for medical expenses related to the accident. The trial court excluded the evidence because the insurance was a collateral source.

The insurance arrangement was under Travelers Group Policy No. GA2300. This policy was obtained pursuant to a health and welfare agreement between participating rail carriers and numerous railway labor organizations, including the Brotherhood of Locomotive Engineers of which appellant is a member. BN argues that evidence of benefits obtained by Anderson through this policy should be admitted because the insurance is not a collateral source. For proof that the insurance is not a collateral source, BN points to the health and welfare agreement which specifically states:

> . . . The parties . . . intend that benefits provided under the policy contract will satisfy any right of recovery against the employing railroad for such

> benefits to the extent of the benefits so provided. Accordingly, —(1) Benefits provided under the policy contract will be offset against any right of recovery the employee may have against the employing railroad for hospital, surgical, medical or related expenses of any kind specified in the policy contract.

The collateral source rule has been applied in an FELA setting by the federal circuit courts with the only question being whether the insurance is in fact a collateral source. See generally *Patterson v. Norfolk and Western Railway Co.* (6th Cir.1973), 489 F.2d 303; *Blake v. Delaware and Hudson Railway Co.* (2nd Cir. 1973), 484 F.2d 204. Title 45 U.S.C. § 55 of the FELA broadens application of the collateral source rule with respect to the circumstances in the instant case. That statute is as follows:

> Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: *Provided*, That in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought.

The United States District Court for the District of Montana has recently interpreted this statute as it applies to the same health and welfare agreement we are dealing with here in an order issued by Chief Judge Battin in the case of *John L. Herbst v. Burlington Northern Railroad Co.*, CV-84-51-BLG. Judge Battin determined that 45 U.S.C. § 55 allows BN to "set off only

the premiums, not what the premiums bought" and prevents BN "from contracting away the benefits of § 55 as was attempted by the Health and Welfare Agreement between the union and the railroad." As a result, Judge Battin granted Herbst's motion in limine to prevent introduction of medical expenses already paid by BN and its insurance company. We will follow Judge Battin's interpretation of 45 U.S.C. § 55 and hold that the provision of the collective bargaining agreement relied upon by BN is void. Accordingly, the collateral source rule applies to the paid medical expenses, and the trial court properly prevented introduction of evidence as to their payment.

VI

Along with the jury verdict for damages of $195,000, the District Court added a directed verdict of $11,795.25 for medical expenses. However, the District Court's jury Instruction No. 12 states:

> . . . The amount of any award shall include:
>
> 1. The reasonable value of medical care, services and supplies reasonably required and actually given in the treatment of Plaintiff . . .

BN complains that this instruction plus the directed verdict and the insurance paid medical expenses results in triple recovery by Anderson for incurred medical expenses. The point is well taken.

It is reversible error to instruct a jury to include medical expenses in its award and then to add a directed verdict for the same medical expense on top of the jury award.

We therefore affirm the judgment for $195,000 but reverse the directed verdict of $11,795.25.

IN THE SUPREME COURT
OF THE STATE OF MONTANA

No. 84-485

JACK D. ANDERSON,
Plaintiff and Respondent,

v.

BURLINGTON NORTHERN, INC., a Delaware Corporation,
Defendant and Appellant.

[Filed Dec. 19, 1985]

ORDER

PER CURIAM:

The petition for rehearing is denied.

DATED this 19th day of December, 1985.

/s/ J. A. Turnage
Chief Justice

/s/ John Conway Harrison

/s/ Frank B. Morrison, Jr.

/s/ Fred J. Weber

/s/ L. C. Gulbrandson

/s/ William E. Hunt
Justices

HON. JACK L. GREEN
District Judge,
sitting in place of Mr.
Justice John C. Sheehy

The Honorable Jack L. Green has advised the Court that he would deny the petition for rehearing.

IN THE SUPREME COURT
OF THE STATE OF MONTANA

No. 84-485

JACK D. ANDERSON,
Plaintiff-Respondent,

—vs—

BURLINGTON NORTHERN, INC., a Delaware Corporation,
Defendant-Appellant.

ORDER TO EXTEND STAY OF
ENFORCEMENT OF JUDGMENT

Motion having been made and good cause appearing therefor,

IT IS HEREBY ORDERED that the stay against the execution of any proceedings to enforce the judgment in this action is extended pending timely filing and disposition of Defendant-Appellant's petition to the United States Supreme Court for a writ of certiorari and, if granted, ultimate review by the Supreme Court. Defendant's supersedeas bond in the amount of $195,000.00 and undertaking of costs, interest and damages that Plaintiff-Respondent may sustain by reason of this stay, as attached hereto, is approved for filing. The Clerk is ordered to file the same.

DATED this 24 day of December, 1985.

/s/ John Conway Harrison
Supreme Court Justice

[Filed Dec. 24, 1985]

IN THE DISTRICT COURT OF THE EIGHTH JUDICIAL DISTRICT OF THE STATE OF MONTANA IN AND FOR THE COUNTY OF CASCADE

No. BDV-179

JACK D. ANDERSON,

Plaintiff,

vs.

BURLINGTON NORTHERN, INC., a Delaware corporation,

Defendant.

JUDGMENT UPON THE DIRECTED VERDICT AND JURY VERDICT

This action came on for a jury trial before the Court commencing June 25, 1984, Honorable John McCarvel presiding. The issues were duly tried and a verdict rendered. The jury verdict found in favor of the Plaintiff, Jack D. Anderson, and against the defendant, Burlington Northern, Inc., a Delaware Corporation, and assessed Plaintiff's damages to be in the sum of ONE HUNDRED NINETY FIVE THOUSAND DOLLARS ($195,000.00). Following the close of the parties' case in chief, the Court granted Plaintiff's motion for a directed verdict as to his claim of incurred medical related expenses to date of trial in the amount of ELEVEN THOUSAND SEVEN HUNDRED NINETY FIVE DOLLARS and TWENTY FIVE CENTS ($11,795.25) and the Court thereby withdrew from the province of the jury that item of claimed damages as a matter of law.

WHEREFORE, by virtue of the law, and by reason of the premises of the aforesaid, it is ordered, adjudged and decreed that Plaintiff have and recover from defendant

the sum of TWO HUNDRED SIX THOUSAND SEVEN HUNDRED HUNDRED [sic] NINETY FIVE DOLLARS and TWENTY FIVE CENTS ($206,795.25) with interest thereon at the rate of ten percent (10%) per annum from the date of the verdict until paid, together with costs and disbursements amount to the sum of $6,093.76.

IT IS FURTHER ORDERED that the Clerk of Court enter the foregoing judgment forthwith and provide notice thereof to all attorneys of record.

DATED this 3rd day of July, 1984.

/s/ John M. McCarvel
District Court Judge

STATUTES

Section 5 of the Federal Employers' Liability Act, 45 U.S.C. § 55 (1982), provides:

> Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: *Provided*, That in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought.

DEFENDANT'S PROPOSED JURY INSTRUCTIONS

INSTRUCTION NO. 17

In determining your verdict, you should calculate any past loss of earnings on the basis of his net earnings, i.e., the earnings left to him after the payment of income taxes.

INSTRUCTION NO. 28

Any award you make to plaintiff will not be subject to federal or state income taxes. You should not consider such taxes in arriving at the amount of your award.

COURT JURY INSTRUCTION NO. 12

This Court finds that on February 28, 1978, at the time complained of, the Defendant violated the Federal Boiler Inspection Act as a matter of law and that violation contributed as a proximate cause to the fall complained of by the Plaintiff. If, under the Court's instructions, you find that the Plaintiff was injured as a result of the incident complained of, then you should award Plaintiff damages in an amount that will reasonably compensate him for each of the following elements of claimed loss or harm, provided that you find that it was or will be suffered by him as a result of the fall in which he was involved on February 28, 1978, and which is the subject of this lawsuit. The amount of any award shall include:

1. The reasonable value of medical care, services and supplies reasonably required and actually given in the treatment of the Plaintiff, and the reasonable value of similar items reasonably certain to be required and given in the future.

2. The reasonable value of wages lost to date by Plaintiff since the injury because of being unable to pursue his occupation as a proximate result of the injuries he received. In determining this amount you should consider evidence of his earning capacity, earnings, and the manner in which he ordinarily occupied his time before the injury and find what he was probably certain to have earned during the time so lost, had he not been disabled.

3. Also such sum as will reasonably compensate the Plaintiff for any loss of future earnings or earning power occasioned by the damages in question. Fixing this amount, you may consider what Plaintiff's health, physical ability and earning power were before the accident, and what they are now. You may also consider the nature and extent of his

injuries, and whether or not they are reasonably certain to be permanent. If not, you may consider the extent of their duration. All of these matters are considered in order to determine first, the effect, if any, of his injuries upon his future earning capacity, and second, the present value of any loss so suffered.

4. Reasonable compensation for any physical pain and emotional distress suffered by the Plaintiff from the date of his injury until the date of his trial which was proximately caused by his injuries and for similar suffering, reasonably certain to be experienced in the future from the same cause.

No definite standard or method of calculation is prescribed by law by which to fix reasonable compensation for pain and suffering. Nor is the opinion of any witness required as to the amount of such reasonable compensation. In making any award for pain and suffering, you shall exercise your authority with calm and reasonable judgment and the damages you fix shall be just and reasonable in light of the evidence.

5. If you find that the Plaintiff has been permanently injured or will continue to suffer in the future from his injuries, you may award Plaintiff such sum as will compensate him reasonably for the destruction, if any, of his capacity to pursue an established course of life as an element of damages, distinct from Plaintiff's loss of earning capacity.

EXCERPTS FROM THE TRIAL TRANSCRIPT

[Tr. 403-406]

(WHEREUPON, the following proceedings were held in chambers, and outside the presence of the jury.)

MR. KOOLEN: We have a couple of things this morning, so I asked Connie to bring her machine in so we can put them on the record. I wanted to start off with an offer of proof, so the record may show that counsel is in chambers with the court in order for the defendant to now state for the record an offer of proof with regard to the subject of income tax liability as it may apply to any award that the jury may make in this case.

The defendant, in its trial brief, indicated that the authority from the U. S. Supreme Court, specifically the Leipelt case, held that a jury should be instructed as to the impact of income taxes on any award that they might find in an FELA case.

The plaintiff has resisted that relying on Montana authority, and the court indicated to us yesterday that in this case you are going to follow the Montana authority, specifially [sic] the Tortia case, and there will be no instruction on the subject of income taxes. And in that regard, I needed to make an offer of proof, and place on the record that if I were permitted to do so, I would cross examine the plaintiff's economist, Professor Harry Gaghen, who is going to testify today, and I learn from Mr. Gaghen that he was provided with copies of the plaintiff's income tax returns for the years 1974 through 1982, and that he obtained information from those income tax returns as a basis for his calculations and his economic projections in this particular matter.

I would learn from him that, according to the plaintiff's income tax returns for the year 1974, he had an income tax liability combined federal and state of about $3,000, which comes to approximately 15 percent of his earnings that year. In 1975, his income tax liability,

both federal and state, was approximately $3,600, for a total of about 17 percent for that year.

Rather than go through each and every year, finally in the year 1982, the plaintiff's income tax returns would show that he paid taxes, both federal and state, of approximately $7,000, which places him in a bracket of about 19 percent.

Therefore, I would be able to prove, through the economist witness, Mr. Gaghen, that the plaintiff's income tax returns show that his past wages have been taxed at an average rate of 17 percent.

Subsequently, when the jury considers the appropriate amount to compensate the plaintiff for his past wage loss, they should consider reducing that amount by 17 percent in order to take into effect—take into account the impact of state and federal income taxes.

Likewise, that would apply to any amount they might award for future damages, since we could reasonably expect that if he were to earn those wages, instead of having them awarded to him, they would be likewise taxed at an appropriate or average rate of about 17 percent. That concludes my offer of proof.

THE COURT: Do you want to respond to that?

MR. HALVERSON: Our response is simply that the controlling authority in the State of Montana is expressed in Tortia v. BN, and McGee v. BN.

THE COURT: Do you have a citation of those cases?

MR. HALVERSON: I would have to go out and get those. They were cited in our trial memorandum.

THE COURT: That's all right. They were 1977 cases, were they?

MR. HALVERSON: Right. And also in the Eighth Judicial District, which we are in now, the case that Mr. Koolen is referring to, the Leipelt case, the case was entitled Dallas v. BN, which was also tried following the holding of the Leipelt case, and the Eighth Judicial District likewise did not follow the Leipelt decision, but relied on Tortia and McGee, and held that

income tax considerations were improper in an award of damages in the state under the FELA.

THE COURT: Okay. The court's ruling will be it's going to follow the Montana cases, and particularly the Tortia case in prohibiting the introduction of cross examination of the economist with reference to the impact, and any income tax liability from any award made to the plaintiff.

* * * *

[Tr. 654-656]

(WHEREUPON, the following proceedings were held in chambers, and outside the presence of the jury.)

THE COURT: Okay. The record will show that the Court is giving Instructions 1 through 24, and all of the other instructions submitted by either party are denied. All right. Court's 1, of course, is a preliminary instruction I gave earlier. Court's 2 is Defendant's 1, less that first page. Court's 3 is Defendant's 2.

MR. HALVERSON: Excuse me, Court's 2 was which one?

THE COURT: Court's 2 is Defendant's 1 less the first page.

MR. HALVERSON: Thank you.

THE COURT: Court's 3 is Defendant's 2. Court's 4 is Defendant's 3, Court's 5 is Defendant's 5, Court's 6 is Plaintiff's 5, Court's 7 is Plaintiff's 7, Court's 8 is Plaintiff's 8.

The Court's 9 is Plaintiff's 9, Court's 10 is Plaintiff's 11, Court's 11 is Plaintiff's 12, Court's 13 is Defendant's 16—wait a minute—what did I say? The Court's 11 is Plaintiff's 12.

MR. KOOLEN: Right.

THE COURT: And the Court's 12 is Plaintiff's 13, Court's 13 is Defendant's 16, Court's 14 is Defendant's 18, Court's 15 is Plaintiff's 14, Court's 16 is Defendant's 20.

The Court's 17 is Defendant's 22, Court's 18 is Plaintiff's 16, Court's 19 is Plaintiff's 18, Court's 20 is Plain-

tiff's 19, the Court's 21 is Plaintiff's 30A, and I will give you a copy of that. The Court's 22 is Plaintiff's 15, the Court's 23 is Plaintiff's 20, and the Court's 24 is Plaintiff's 17. The record will show that each side is permitted 50 minutes' final argument.

* * * *

[Attachment to Defendant's Brief in Opposition to Plaintiff's Motion *In Limine*]

HEALTH AND WELFARE AGREEMENT

THIS AGREEMENT, made this 22nd day of October 1975 by and between the participating carriers listed in Exhibit A, attached hereto and hereby made a part hereof, and represented by the National Carriers' Conference Committee, and the employees of such carriers shown thereon and represented by the Railway Labor Organizations signatory hereto, witnesseth:

WHEREAS earlier in 1975 certain agreements were reached between the railroads parties thereto, as represented by the National Carriers' Conference Committee, and the employees respectively covered thereby as represented by certain of the Railway Labor Organizations signatory hereto, and

WHEREAS such railroads and the remaining Railway Labor Organizations signatory hereto are in agreement with respect to the provisions of such agreements which relate to health and welfare benefits,

IT IS AGREED:

ARTICLE I—IMPLEMENTATION OF THE FOLLOWING PROVISIONS OF THIS AGREEMENT

The Joint Policyholder Committee created by Article I of the Agreement of January 11, 1968 will continue discussions with The Travelers Insurance Company with a view toward negotiation of amendments to Group Policy Contract GA-23000, extension of such policy contract as amended, and effectuation without undue delay of the prior agreement by the parties to this Agreement—

"in principle to adoption of a premium-plus-account approach to funding GA-23000, provided that further thorough exploration confirms the advice given us that the interests of the Policyholder will not be adversely affected,"

to the end that (except as set forth in the following Articles of this Agreement) the benefits currently provided by the policy contract may continue to be provided, under the eligibility provisions currently in effect, for the period through December 31, 1977, the railroads to pay the cost of providing such benefits offset by such amounts as may be available from the Special Account.

ARTICLE II—AMENDMENT OF GROUP POLICY CONTRACT GA-23000 RELATING TO HUSBAND-AND-WIFE TEAMS

The Joint Policyholder Committee will negotiate with the Insurer to amend Group Policy Contract GA-23000 to the end that in situations in which both husband and wife work for railroads and are covered by the Policy Contract, in place of the present provision under which both may be covered for employee benefits only, a coordination of benefits approach will apply, with proper safeguards for hospital association arrangements. The intention of this provision is to treat the husband and wife team as if one worked for an employer other than a railroad. Attachment 1 hereto sets forth in detail the principles involved. This amendment is to be effective September 1, 1975.

ARTICLE III—LIABILITY CASES

Section A. Employees of Non-Hospital Association Railroads

In case of an injury or a sickness for which an employee who is eligible for employee benefits under Group Policy Contract GA-23000 and may have a right of re-

covery against either the employing railroad or a third party tort-feasor (a party who has committed a wrongful act), or both, benefits will be provided under the policy contract subject to the provisions hereinafter set forth. The parties hereto do not intend that benefits provided under the policy contract will duplicate, in whole or in part, any amount recovered from either the employing railroad or a third party tort-feasor for hospital, surgical, medical or related expenses of any kind specified in the policy contract, and they intend that benefits provided under the policy contract will satisfy any right of recovery against the employing railroad for such benefits to the extent of the benefits so provided. Accordingly,—

(1) Benefits provided under the policy contract will be offset against any right of recovery the employee may have against the employing railroad for hospital, surgical, medical or related expenses of any kind specified in the policy contract.

(2) On any recovery from any tort-feasor other than the employing railroad for hospital, surgical, medical or related expenses of any kind specified in the policy contract, the employee will reimburse the Insurer from such recovery for any benefits paid under the policy contract. Except in a case involving an on-duty injury, the Insurer will be subrogated to any right of recovery the employee may have against any tort-feasor other than the employing railroad for hospital, surgical, medical or related expenses of any kind specified in the policy contract.

Section B. Dependents of Employees of Hospital Association and Non-Hospital Association Railroads

The same principles and provisions as are spelled out in Section A of this Article III with respect to third

party tort-feasors apply to Dependents (on both hospital association and non-hospital association railroads) as to Employees.

Section C. Employees of Hospital Association Railroads

With respect to offsets by a hospital association railroad against any right of recovery the employee may have against the railroad, the principles set forth in Section A of this Article III apply.

Section D. Amendment of Group Policy Contract GA-23000

The Joint Policyholder Committee will negotiate with the Insurer to amend Group Policy Contract GA-23000 to include the third party tort-feasor subrogation provisions in Paragraph 2 of Section A of this Article III, with the understanding that such provisions will be exercised only when practicable.

Section E. Employee Booklet

The Insurer will be requested to include in the employee certification and information booklet a statement setting forth the intent of Sections A, B and C of this Article III insofar as they relate to the employing railroad, as well as such statement as may be appropriate in relation to the third party tort-feasor subrogation provisions.

ARTICLE IV—EFFECT OF THIS AGREEMENT

This Agreement is in implementation of the agreement provisions referred to in the preamble hereof, and shall remain in effect through December 31, 1977 and thereafter until changed or modified in accordance with the provisions of the Railway Labor Act, as amended.

SIGNED AT WASHINGTON, D. C., THIS 22nd DAY OF OCTOBER, 1975.

FOR THE PARTICIPATING CARRIERS LISTED IN EXHIBIT A:

/s/
Chairman

/s/

/s/

/s/

/s/

/s/

/s/

/s/

/s/

/s/

/s/

HEALTH AND WELFARE COMMITTEE, COOPERATING RAILWAY LABOR ORGANIZATIONS:

/s/
Chairman

RAILWAY EMPLOYES' DEPARTMENT, AFL-CIO:

/s/
President

INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS:

/s/
International President

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS:

/s/
International Vice President

BROTHERHOOD RAILWAY CARMEN OF THE UNITED STATES AND CANADA:

/s/
General President

INTERNATIONAL BROTHERHOOD OF FIREMEN AND OILERS:

/s/
President

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS:

/s/
General Vice President

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION:

/s/
General Vice President

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYERS:

/s/
International President

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES:

/s/
President

BROTHERHOOD OF RAILROAD SIGNALMEN:

/s/
President

HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION:

/s/
Vice President

NATIONAL MARINE ENGINEERS' BENEFICIAL ASSOCIATION:

/s/
National President

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION:

/s/
International Representative

UNITED TRANSPORTATION UNION:

/s/
President

BROTHERHOOD OF LOCOMOTIVE ENGINEERS:

/s/
President

AMERICAN TRAIN DISPATCHERS ASSOCIATION:

/s/
President

RAILROAD YARDMASTERS OF AMERICA:

/s/
Grand President

AMERICAN RAILWAY SUPERVISORS ASSOCIATION:

/s/
Grand President

BROTHERHOOD OF SLEEPING CAR PORTERS:

/s/
International President

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

CV-84-51-BLG

JOHN L. HERBST,

Plaintiff,

—vs—

BURLINGTON NORTHERN RAILROAD COMPANY,
a corporation,

Defendant.

[Filed Apr. 22, 1985]

ORDER

This case is before the Court on plaintiff's and defendant's motions in limine. For the reasons stated below, the plaintiff's motion is granted and the defendant's motion is denied.

DISCUSSION

Plaintiff seeks an order preventing introduction of evidence pertaining to the payment of plaintiff's medical expenses by defendant or its insurance company. Defendant objects to plaintiff's motion and moves for an order preventing introduction of evidence pertaining to medical expenses incurred by plaintiff.

The collateral source rule has been applied in the FELA setting by the appellate courts with the only question being whether the insurance is in fact a collateral source. *See* generally *Patterson v. Norfolk and Western*

Railway, 489 F.2d 303 (6th Cir. 1973); *Blake v. Delaware and Hudson Railway Co.*, 484 F.2d 204 (2d Cir. 1973).

The collateral source rule has been codified in the FELA setting, the effect of which is to further broaden what is determined to be a collateral source. Not only is it true "that the employer-tortfeasor is not entitled to mitigate damages by setting off compensation received by the employee from an independent source," *Blake*, 484 F.2d at 206 citing *Haughton v. Blackships, Inc.*, 472 F.2d 788, 790 (5th Cir. 1972), but "under 45 U.S.C. § 55 the railroad is entitled to set off only the premiums, not what the premiums bought" when the railroad's own insurance supplies the benefits to the employee. *Blake*, 489 F.2d at 207 (Judge Friendly's concurrence). Furthermore, 45 U.S.C. § 55 prevents the railroad from contracting away the benefits of § 55 as was attempted by the Health and Welfare Agreement between the union and the railroad. Therefore,

IT IS ORDERED that plaintiff's motion in limine is granted and defendant's motion in limine is denied.

The Clerk is directed forthwith to notify counsel for the respective parties of the making of this order.

Done and dated this 22nd day of April, 1985.

/s/ James F. Battin
Chief Judge

Not To Be Published In Official Reports

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FOUR

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1 Civil No. 40048
(Sup. Ct. No. 674 956)

SEVERIANO V. LOPEZ,
Plaintiff and Respondent,

vs.

SOUTHERN PACIFIC TRANSPORTATION COMPANY,
Defendant and Appellant.

Plaintiff-respondent Severiano Lopez commenced this action against appellant Southern Pacific Transportation Company pursuant to the Federal Employers' Liability Act, 45 U.S.C., § 51 et seq. (hereinafter referred tc as FELA). The answer set up the affirmative defense that Southern Pacific had paid certain disability benefits to Lopez and that the railroad should be entitled to offset the benefits paid against any judgment rendered in Lopez' behalf.

At the commencement of trial, the parties agreed to have the court decide the offset issue at the conclusion of the case. The jury returned a verdict for Lopez in the sum of $45,000. The following week, the court conducted a hearing on the offset issue and ruled that Southern Pacific was not entitled to offset the benefits paid to Lopez against the judgment.

A notice of appeal was filed from the judgment and the order of the trial court denying Southern Pacific's

claim for an offset against the judgment. Thereafter, the parties agreed that Southern Pacific would satisfy that portion of the judgment in excess of the claimed offset and that this appeal by Southern Pacific would be limited to the order denying the offset.

Plaintiff-respondent Severiano Lopez is a railroad maintenance of way worker employed by Southern Pacific. On February 25, 1974, he was injured when he tripped and fell at Southern Pacific's railroad yard located at Indio, California. As a result of the fall, plaintiff suffered injuries to his back. During his period of recovery, plaintiff received $3,276 in insurance benefits from the Benefit Trust Life Insurance. These benefits were received as a result of a nationwide collective bargaining agreement between plaintiff's bargaining agent, the Brotherhood of Maintenance of Way Employees, and the National Carriers' Conference Committee, which represents the country's railroads at the bargaining table. The terms of this agreement, embodied in Maintenance of Way Employees' Supplemental Sickness Benefit Agreement, dated May 15, 1973, allowed eligible maintenance of way employees to receive certain specified benefits while off work. Provision 6 of the agreement, which deals with liability cases, however, provided that any benefits received by the employee were to be offset against any judgment or damages subsequently awarded to the employee.[1] After the agreement was entered into,

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[1] Provision 6 of the agreement states:

"6. *Liability Cases.* In case of a disability for which the employee may have a right of recovery against either the employing railroad or a third party, or both, benefits will be paid under this Plan pending final resolution of the matter so that the employee will not be exclusively dependent upon his sickness benefits under the Railroad Unemployment Insurance Act. However, the parties hereto do not intend that benefits under this Plan will duplicate, in whole or in part, any amount recovered for loss of wages from either the employing railroad or a third party, and they intend that benefits paid under this Plan will satisfy any right of recovery

the union and Southern Pacific selected Benefit Trust Life Insurance Company to administer the plan, designated Group Contract 7000.

Following Lopez' injury, he applied for and received $3,276 in Group Contract 7000 Disability Payments from Benefit Trust Life Insurance.

The sole issue on appeal is whether Southern Pacific is entitled to offset the $3,276 paid to Lopez under the Group Contract 7000 Disability Insurance Policy against the $45,000 judgment rendered against the railroad.

Lopez contends that the disability benefits received fall within the collateral source rule[2] and, as such, the railroad is not entitled to offset the benefits paid to him by the insuarnce company. (Russo v. Matson Navigation

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for loss of wages against the employing railroad to the extent of the benefits so paid. Accordingly, benefits paid under this Plan will be offset against any right of recovery for loss of wages the employee may have against the employing railroad; the employing railroad, or the insuring agent if one is involved, will be subrogated to any right of recovery for loss of wages the employee may have against any party other than the employing railroad; as a condition to paying any benefits under this Plan the employing railroad, or the insuring agent if one is involved, may require the employee to assign to it any such recovery or right thereto from any party other than the employing railroad to the extent that benefits are payable under this Plan; and on any recovery for loss of wages from any party other than the employing railroad, the employee will reimburse the employing railroad, or the insuring agent if one is involved, from such recovery for any benefits paid under this Plan. For purposes of this Paragraph, a recovery which does not specify the matters covered thereby shall be deemed to include a recovery for loss of wages to the extent of any actual wage loss due to the disability involved."

[2] The collateral source rule provides that a tortfeasor cannot reduce the amount of his liability upon a judgment for an injured plaintiff by reason of compensation or insurance proceeds paid to the plaintiff from a collateral source independent of the tortfeasor. (Hall v. Minnesota Transfer Railway Company, 322 F.Supp. 92, 94-95.)

Company, 486 F.2d 1018; United States v. Price, 288 F.2d 448, 449.) Thus, the issue presented is whether the benefits received by Lopez come from a collateral source. Application of this rule depends upon the character of the benefits received. (Hall v. Minnesota Transfer Railway Company, 322 F.Supp. 92, 95.) The mere fact that the employer-tortfeasor has contributed money to the fund by payment of premiums does not establish that such fund may not be a collateral source. If the premiums are contributed by the employer as a result of a contract between the employer and union and payment to the employee is in the nature of a fringe benefit or deferred compensation, then it has been held that the employer should not be entitled to benefit by setting off income in mitigation of his responsibilities as a tortfeasor. (Haughton v. Blackships, Inc., 462 F.2d 788, 791.) If, on the other hand, an employer-tortfeasor voluntarily undertakes to indemnify itself against liability by purchasing a policy, plaintiffs should not be allowed recovery of these benefits as well as his full measure of damages. (Haughton, *supra*, at p. 791.)

On the basis of the foregoing, we conclude that this policy is a fringe benefit maintained by the employer for services rendered to the employees. This policy arose out of collective bargaining between the union and representatives of the railroads. One of the purposes of the policy was to insure that disabled employees are not exclusively dependent upon their sickness benefits under the Railroad Unemployment Insurance Act while awaiting final resolution of a suit against the railroad or a third party. Furthermore, the policy provides benefits to employees who sustain "*accidental bodily injury* which occurred or a *sickness* which commenced while the employee was insured." Eligibility is not dependent on the disability occurring in the course of employment or as a result of employer negligence. In view of these facts, we categorize these benefits as arising from a collateral source.

Southern Pacific disputes this conclusion by arguing that the contract expressly provided under provision 6 that benefits received in cases of the railroad's or a third party's negligence are to be offset against any judgment rendered. The merit of this contention turns on the validity of this offset provision.

Under 45 U.S.C., section 55: "Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: *Provided*, That in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought." Under this section it is clear that if the railroad is entitled to reimbursement at all, it is only to the extent of the premiums that were paid by them, *not* the benefits received by plaintiff from the insurance company. (See Blake v. Delaware and Hudson Railway Company, 484 F.2d 204, 207; Russo v. Matson Navigation Company, *supra*, 486 F.2d 1018.)

The railroad maintains that it is not attempting to exempt itself from liability by provision 6, but only seeking to prevent Lopez from receiving a double recovery. In so arguing, it relies on *Thomas v. Penn Central Company*, 379 F.Supp. 24. In *Thomas*, the collective bargaining agreement provided that the railroad "will transmit to The Travelers Insurance Company *81 cents per 'Qualifying Employee' per month as premium for the insurance benefit payments resulting from on-duty injuries.* The amounts so transmitted are not considered as wage equivalents; separate experience rating of benefits payable by reason of on-duty injuries will be main-

tained; any retroactive premium credit based on such separate experience rating will be separately determined and will be held in the Special Account *as a separate fund to be applied to the cost of insurance benefits payable as a result of on-duty injuries.*" (*Id.*, at p. 27; emphasis added.) Plaintiff Thomas sustained an on-duty injury and in a subsequent FELA action he received a verdict in the amount of $47,134. The railroad paid this judgment with the exception of $3,374.80 that it had paid to various hospitals, doctors and creditors of Thomas for medical expenses after the verdict. Thomas then brought suit asking for a complete satisfaction of the judgment. Thomas maintained that he was entitled to the entire amount of the judgment as the railroad would be reimbursed from The Travelers Insurance Company. The court denied Thomas a right to reimbursement under both the collateral source rule and 45 U.S.C., section 55, because the railroad had specifically purchased the policy in order to protect itself against liability. The court stated: "[W]here the railroad has made payments on account of *on-duty injuries and has merely been reimbursed by an insurance policy which it has purchased for that purpose*, such a policy cannot be a prohibitive device intended by the carrier 'to exempt itself from any liability'; rather, it is a method of obtaining funds to pay such liability and would thus not fall within the prohibition of the Statute." (*Id.*, at p. 27; emphasis added.)

Southern Pacific's reliance on *Thomas* is unwarranted as the contractual provision in this case differs significantly from that in *Thomas*. There is no evidence in the present case that the railroad paid the premiums of this disability policy for the purpose of obtaining funds to pay any potential liability for negligence. Furthermore, Congress has specifically limited any setoff in a FELA judgment to the *amount of the premium paid on the employee's policy*. (See Blake v. Delaware and Hudson

Railway Company, *supra*, 484 F.2d 204, at p. 207; Russo v. Matson Navigation Company, *supra*, 486 F.2d 1018.)

As provision 6 does not heed the express prohibition of 45 U.S.C., section 55, the trial court did not err in denying the railroad the right to set off any of the benefits received by Lopez from the insurance company.

In conclusion, we reiterate that while 45 U.S.C., section 55 may at times permit a double recovery, it never imposes a double burden. (Russo, *supra*, at p. 1021.) The tortfeasor here, Southern Pacific, bears only its single burden of $45,000 for its negligence.

The judgment is affirmed.

CALDECOTT, P. J.

We concur:

RATTIGAN, J.

CHRISTIAN, J.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

Civil No. H 79-13

JESUS DIAZ,

Plaintiff,

v.

INDIANA HARBOR BELT RAILROAD COMPANY,

Defendant.

[Filed Dec. 1, 1981]

MEMORANDUM OF DECISION AND ORDER

This cause is now before the Court on a motion for partial summary judgment filed by the defendant on June 25, 1981 pursuant to Rule 56(b) of the Federal Rules of Civil Procedure.[1] The plaintiff has filed a response[2] to the motions, and the issues presented therein have been fully briefed by the parties. For the reasons which follow, the defendant's motion for partial summary judgment will be GRANTED.

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[1] On September 22, 1981 the defendant filed a Motion in Limine which reiterates the issues presented in the Rule 56 motion. For the sake of analysis, however, said motions will be considered together and the Order herein will be dispositive as to both.

[2] On October 26, 1981 the plaintiff filed a "Motion to Strike" which the Court deems as constituting a "response" to a motion for partial summary judgment, as provided pursuant to Local Rule 7(b) and Rule 56(e) of the Federal Rules of Civil Procedure.

Background

The plaintiff, Jesus Diaz, commenced this cause of action on January 12, 1979. By his complaint, the plaintiff seeks money damages for personal injuries allegedly incurred due to the negligence of his employer, defendant, Indiana Harbor Belt Railroad Co.[3] The cause of action is brought pursuant to the Federal Employees' Liability Act, 45 U.S.C. § 51 *et seq.* (hereinafter "FELA" or "the Act").

Issue Presented

By its current motion, the defendant argues that, as a matter of law, the plaintiff is barred from seeking damages for medical bills which have been paid by Travelers Insurance Company under Group Policy GA23000. That policy, issued and maintained pursuant to a Health and Welfare Agreement between many railroads, including the defendant, and the collective bargaining representatives of their employees, covers hospital and medical expenses of the insured employees, including plaintiff, and of their dependents. The premiums on the policy are paid by the several railroads.

Article III, Section A(1) of the Health and Welfare Agreement provides as follows:

> In case of an injury or a sickness for which an employee who is eligible for employee benefits under Group Policy Contract GA-23000 and may have a right of recovery against either the employing rail-

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[3] On or about September 24, 1976, the plaintiff was employed by the defendant as a track laborer. On said date, while acting in the scope of his employment, the plaintiff stepped down from an engine onto the right-of-way. In doing so, the plaintiff struck his right foot against a rock which was hidden by tall weeds and grass. This rock caused the plaintiff to twist and injure his right ankle, which eventually rendered him disabled and required corrective surgery. It is alleged that the defendant's negligence in not properly maintaining its right-of-way was the proximate cause of the plaintiff's injury.

road or a third party tort-feasor (a party who has committed a wrongful act), or both, benefits will be provided under the policy contract subject to the provisions hereinafter set forth. The parties hereto do not intend that benefits provided under the policy contract will duplicate, in whole or in part, any amount recovered from either the employing railroad or a third party tort-feasor for hospital, surgical, medical or related expenses of any kind specified in the policy contract, and they intend that benefits provided under the policy contract will satisfy any right of recovery against the employing railroad for such benefits to the extent of the benefits so provided. Accordingly,

> (1) Benefits provided under the policy contract will be offset against any right of recovery the employee may have against the employing railroad for hospital, surgical, medical or related expenses of any kind specified in the policy contract.

The defendant asserts that the language of the Agreement now bars the plaintiff's claim for medical bills. The plaintiff, in response, asserts that the subject insurance policy constituted a "fringe benefit" to the plaintiff and, as such, is a "collateral source" of recovery against which the defendant may not set-off the amount of premiums paid or benefits received thereunder by the employees.

Discussion

Issues relating to the measure of damages in FELA actions are governed by Section 5 of the Act, 45 U.S.C. § 55, which reads as follows:

> Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent

> be void: *Provided*, That in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought.

Generally, in FELA cases like the one at bar, federal practice has been to determine whether a particular benefit falls within Section 5; if it does not, the 'collateral source rule' is invoked and mitigation is denied. *See Blake v. Delaware and Hudson Railway Company*, 484 F.2d 204 (2nd 1973); *Lucht v. Chesapeake & O. Ry. Co.*, 489 F. Supp. 189 (W.D.Mich. 1980); *Urbaniak v. Erie Lackawanna Ry. Co.*, 424 F. Supp. 981 (W.D.N.Y. 1977); *Hall v. Minnesota Transfer Railway Company*, 322 F. Supp. 92 (D.Minn. 1971). However, blanket application of the FELA's codified collateral source rule has come under judicial criticism. In a concurring opinion in the *Blake* case, *supra* at 207, Judge Friendly stated:

> Permitting Blake to recover from the railroad the bulk of his hospital bills, which were paid by the railroad and not by him, seems to be shockingly unjust.
>
> * * * *
>
> If the railroads wish to avoid the harsh result reached by the district court, they can accomplish this by specific provision in the collective bargaining agreement.

The defendant represents to this Court that Article III, Section A of the subject Health and Welfare Agreement is the kind of "specific provision" referred to by Judge Friendly that would prevent the application of the

seemingly harsh collateral source rule. To this argument the plaintiff makes no refutation.[4]

After having thoroughly examined the pleadings, motions, exhibits, affidavits and memorandums submitted herein, the Court finds that the defendant's argument is well-taken, and that the defendant is entitled to a credit for payments received by the plaintiff under Group Policy GA23000. *See Thomas v. Penn Central Company*, 379 F.Supp. 24 (W.D.Pa. 1974); *Nelson v. Penn Central R.R. Co.*, 415 F.Supp. 225 (S.D.Ohio 1976); *Rogers v. Chicago and Northwestern Transportation Company*, 375 N.E.2d 852 (Ill.App. 1978). *Cf. Urbaniak, supra* at 984 (court felt constrained to follow *Blake* after finding no "specific provision" in the collective bargaining agreement before it).

ORDER

Accordingly, it is ORDERED that the defendant's motion for partial summary judgment be GRANTED as to the plaintiff's claim for medical expenses; it is further

ORDERED that the defendant's motion in limine be GRANTED so as to preclude the plaintiff from offering evidence of medical expenses at the trial of the above-entitled cause of action.

Entered this 1st day of December, 1981.

/s/ James T. Moody
Magistrate
United States District Court

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[4] The plaintiff's Response Memorandum and "Motion to Strike" focuses on the provisions of Group Policy GA23000 rather than on the provisions of the Agreement. Essentially, the plaintiff argues that anytime Group Policy GA23000 appears in an FELA case, it "should be given the same treatment" as in prior cases; despite the fact that those cases did not involve a "specific" collective bargaining agreement provision which acts to the contrary.

(3)

No. 85-1544

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1985

BURLINGTON NORTHERN, INC.,
Petitioner,

v.

JACK D. ANDERSON,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether in an action under the Federal Employer's Liability Act ("FELA"), 45 U.S.C. §§ 51-60, Section 5 of that Act and the collateral source rule permit a railroad to set off in mitigation of its liability to an injured employee the amount in medical expenses which were paid on the employee's behalf under a group medical and hospital insurance policy which is a fringe benefit of employment to the employee?

2. Whether it is reversible error for a trial judge in an FELA action to not instruct the jury that the plaintiff's damage award is not subject to income taxation when the jury does not act under a false impression of the tax laws and award an amount clearly in excess of plaintiff's proven damages?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 2

I. THE OPINION BELOW CORRECTLY HELD THAT THE RAILROAD CANNOT SET OFF FROM ITS LIABILITY UNDER THE FELA THE AMOUNT IN MEDICAL EXPENSES PAID PURSUANT TO POLICY GA-23000 2

A. Background Of The Distinction Between Coverage For Operating Versus Non-Operating Railroad Employees Under Policy GA-23000 3

B. As Applied To Operating Employees, The Collateral Source Doctrine Precludes The Set-Off Of Either Premiums Contributed To, Or Benefits Paid Under, Policy GA-23000 4

C. Even If The On-Duty Injury Clause of Policy Ga-23000 Represents An Employer Indemnity Plan, Section 5 Of The FELA Allows The Railroads To Set Off Only The Premiums Paid 8

D. Petitioner's Authorities Distinguished 14

II. THE OPINION BELOW DOES NOT CONFLICT WITH THIS COURT'S DECISION IN *LIEPELT* 17

A. This Court Has Denied Certiorari Review Of Several Cases Applying The Harmless Error Rule Since *Liepelt* 17

TABLE OF CONTENTS—Continued

Page

B. Certiorari Review Is Unnecessary Since The Decision Below Requires Trial Courts To Give The *Liepelt* Instruction In The Future ... 21

C. The Issue As To The Admissibility Of Evidence Regarding After Tax Earnings Was Not Passed Upon In The Decision Below 22

CONCLUSION 24

APPENDIX ..... App. 1

Excerpts from the Trial Transcript

TABLE OF AUTHORITIES

Page

CASES

Anderson v. Burlington Northern, Inc., — Mont. —, 709 P.2d 641 (1985) 17, 18, 21

Blake v. Delaware & Hudson Railway, 484 F.2d 204 (2d Cir. 1973) 5, 6, 7, 12, 13

Bangor & Aroostook R. Co. v. Jones, 36 F.2d 886 (1 Cir. 1929) 11, 12

Boyd v. Grand Trunk Western Railroad Co., 338 U.S. 263 (1949) 10

Bracy v. Great Northern Railway Co., 136 Mont. 65, 343 P.2d 848 (1959) 21

Brewer v. Jeep Corp., 724 F.2d 653 (8th Cir. 1983) 18

Caribe Tugboat Corp. v. Duffy, 427 So.2d 227 (Fla. Dist. Ct.App. 1983) (per curiam), *cert. denied*, 464 U.S. 1041 (1984) 21

Chicago & Alton Railroad Co. v. Wagner, 239 U.S. 452 (1915) 12

Clark v. Burlington Northern, Inc., 726 F.2d 448 (8th Cir. 1984) 5, 6, 7

Dallas v. Burlington Northern, Inc., — Mont. —, 689 P.2d 273 (1984) 19

Diaz v. Indiana Harbor Belt Railroad, Civ. No. H79-13 (N.D. Ind. Dec. 1, 1981) 14, 15

Duncan v. Thompson, 315 U.S. 1 (1942) 9, 10

Eichel v. New York Central Railway Co., 375 U.S. 253 (1963) 7, 8

Employer's Liability Cases, 207 U.S. 463 (1907) 9

Faulkenberry v. Kansas City Southern Railway, 661 P.2d 510 (Okla. 1983), *cert. denied*, 464 U.S. 850 (1983) 20

TABLE OF AUTHORITIES—Continued

Page

Feeley v. United States, 337 F.2d 924 (3d Cir. 1964) 17

Flanigan v. Burlington Northern, Inc., 632 F.2d 880 (8th Cir. 1980), *cert. denied*, 450 U.S. 921 (1981) 19, 20, 23

Grayson v. Williams, 256 F.2d 61 (10th Cir. 1958) 7

Gypsum Carrier, Inc. v. Handelsman, 307 F.2d 525 (9th Cir. 1962) 6, 8

Hall v. Minnesota Transfer Railway, 322 F. Supp. 92 (D. Minn. 1971) 5, 6, 7, 16

Haughton v. Blackships, Inc., 462 F.2d 788 (5th Cir. 1972) 5, 6, 7, 16

Herbst v. Burlington Northern Railroad, CV-84-51 BLG (D.Mont. April 22, 1985) 7, 12

Illinois v. Gates, 462 U.S. 213 (1983) 22

Jones & Laughlin Steel Corp. v. Pfeifer, 462 U.S. 523 (1983) 18

Lavender v. Kurn, 327 U.S. 645 (1946) 23

Lopez v. Southern Pacific Transportation Co., 1 Civ. No. 40048 (Cal. Ct. App. 1977) 5, 7, 8, 12

Lucht v. Chesapeake & Ohio Railway, 489 F.Supp. 189 (W.D. Mich. 1980) 12

Marlow v. Atchison, Topeka & Santa Fe Railway, 671 P.2d 438 (Colo. Ct.App. 1983) 21, 22

Marynik v. Burlington Northern, Inc., 317 N.W.2d 347 (Minn. 1982) 21

McGoldrick v. Compagnie Generale, 309 U.S. 430 (1940) 22

McLanahan v. Universal Insurance Co., 26 U.S. (1 Pet.) 170 (1828) 18

McWeeney v. New York, New Haven and Hartford Railroad, 282 F.2d 34 (2d Cir. 1960) 20

TABLE OF AUTHORITIES—Continued

Page

Meyers v. Union Pacific Railroad Co., 738 F.2d 328 (8th Cir. 1984) 18

N.L.R.B. v. Pittsburgh S.S. Co., 340 U.S. 498 (1951) 17

Nelson v. Penn Central Railroad, 415 F.Supp. 225 (N.D. Ohio 1976) 14, 15

Norfolk & Western Railway v. Liepelt, 444 U.S. 490 (1980) ..... *passim*

Page v. St. Louis Southwestern Railway Co., 349 F.2d 820 (5th Cir. 1965) 8

Patterson v. Norfolk & Western Railway, 489 F.2d 303 (6th Cir. 1973) 5, 6, 7, 16

Philadelphia, Baltimore & Washington R. Co. v. Schubert, 224 U.S. 603 (1912) 10, 11

Pugh v. McCormick, 81 U.S. (14 Wall.) 361 (1871) 18

Rogers v. Chicago & North Western Transportation Co., 375 N.E.2d 952 (Ill. App. 1978) 14, 15

Rouse v. Chicago, R.I. and P.R.R., 474 F.2d 1180 (8th Cir. 1973) 20

Russo v. Matson Navigation Co., 486 F.2d 1018 (9th Cir. 1973) 5, 6, 7, 8, 11, 16

Southern Pacific Transportation Co. v. Allen, 525 S.W.2d 300 (Tex. Civ. App. 1975) 6, 7, 9

State Farm Automobile Insurance Co. v. Duel, 324 U.S. 154 (1945) 22

Taylor v. Burlington Northern, Inc., No. 84-3764 (9th Cir. April 18, 1985) (available on West law) 19

Thomas v. Humble Oil & Refining Co., 420 F.2d 793 (4th Cir. 1970) 15

TABLE OF AUTHORITIES—Continued

Page

Thomas v. Penn Central Co., 379 F. Supp. 24 (W.D. Pa. 1974) 4, 14

Tipton v. Socony Mobil Oil Co., 375 U.S. 34 (1963) 8

Torchia v. Burlington Northern, Inc., 174 Mont. 83, 568 P.2d 558 (1977) 21

United States v. Borden Co., 347 U.S. 514 (1954) 18

United States v. Price, 288 F.2d 448 (4th Cir. 1961) 6

Urbaniak v. Erie Lackawanna Railway, 424 F. Supp. 981 (W.D.N.Y. 1977) 3, 4, 7

Vanskike v. ACF Industries, 665 F.2d 188 (8th Cir. 1981), *cert. denied*, 455 U.S. 1000 (1982) 20

Wagner v. Reading Co., 428 F.2d 289 (3d Cir. 1970) 16

Wilcox v. Clinchfield Railroad, 747 F.2d 1059 (6th Cir. 1984) 7

STATUTES

26 U.S.C. § 3221 (1982) 8

28 U.S.C. § 2111 (1982) 18

45 U.S.C. § 55 (1982) ..... *passim*

46 U.S.C. § 688 (1982) 11

34 Stat. 232 (1906) 9

LEGISLATIVE MATERIALS

H.R. Rep. No. 1386, 60th Cong., 1st Sess. (1908) 9

S. Rep. No. 460, 60th Cong., 1st Sess. (1908) 10

40 Cong. Rec. 7662 (1906) 11

TABLE OF AUTHORITIES—Continued

Page

MISCELLANEOUS

Kalven, A report on the Jury Project, Conference on the Aims and Methods of Legal Research, University of Michigan Law School (1957) 20

No. 85-1544

In The
Supreme Court of the United States
October Term, 1985

BURLINGTON NORTHERN, INC.,
Petitioner,

v.

JACK D. ANDERSON,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

The respondent, Jack D. Anderson, disagrees with and supplements the petitioner's statement of the case regarding the following points. The medical bills Mr. Anderson incurred in treatment of the injuries he sustained in his accident of February 28, 1978, were not paid either directly by or through an indemnity plan. They were paid pursuant to a policy of general health and accident insurance known as Travelers Insurance Group Policy No. GA-23000. At no time during the lower court proceedings did the B.N. either prove the portion of the

premium it contributed to Travelers Insurance for coverage afforded the plaintiff under Policy GA-23000, or request as a set off against its FELA liability the amount of the *premiums* it paid on his behalf.

———o———

REASONS FOR DENYING THE WRIT

I. THE OPINION BELOW CORRECTLY HELD THAT THE RAILROAD CANNOT SET OFF FROM ITS LIABILITY UNDER THE FELA THE AMOUNT IN MEDICAL EXPENSES PAID PURSUANT TO POLICY GA-23000.

The decision below, precluding the railroad from setting off from its liability under the FELA the amounts in medical expenses paid under Travelers Group Health and Accident Policy No. GA-23000, was in accordance with the substantial body of law that has considered this issue in view of the collateral source rule and Section 5 of the FELA. The result does not conflict with the applicable decisions of this Court, the federal appellate courts, or another state court of last resort. When the factual situations involved in the cases relied upon by petitioner are examined, it is evident these authorities are not controlling. Contrary to the assertions of petitioner, no questions of law are present in this case which justify the grant of a writ of certiorari.

A. Background Of The Distinction Between Coverage For Operating Versus Non-Operating Railroad Employees Under Policy GA-23000

To fully understand the basis for what seemingly appear to be different results reached by courts on this question, it is necessary to review the distinction between the manner in which non-operating as opposed to operating railroad employees obtained coverage under this policy. This forms, in part, the basis for differentiating a limited employer indemnity plan from a general policy of health and accident insurance which is a fringe benefit to the employee and within the ambit of the collateral source rule. The respondent in this case is a locomotive engineer, an operating employee engaged in the actual operation of the trains.

Prior to 1955, the union agreements with the railroads for both categories of employees did not require the payment of medical expenses for on-duty injuries. In 1955, an agreement was entered into between the railroads and the union representing *non*-operating employees wherein the union elected to receive lesser wages than those paid to operating employees in exchange for coverage under Policy No. GA-23000. The operating employees chose to receive the cost of the coverage in money wages.[1] Thereafter, the Collective Bargaining Agreement of August 19, 1960, at Article V, Section 1(d)(1), recited the agreement with the *non*-operating employees—that the premiums for medical payments covering on-duty injur-

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[1] *See Urbaniak v. Erie Lackawanna Railway*, 424 F. Supp. 981, 983 (W.D.N.Y. 1977).

ies were to be paid solely by the railroad and *not* considered as wage equivalents to the employee.[2]

The operating employees were not covered by the policy until an agreement was reached on March 26, 1964. Their agreement omitted the provision that the premiums for the on-duty injury coverage were not wage equivalents. In 1968, both groups of employees became insured through the same Group Policy No. GA-23000 and although it was later amended, the premium structure remained the same.[3] As discussed following, the coverage for operating employees is a bargained for fringe benefit of employment in lieu of wages.

B. As Applied To Operating Employees, The Collateral Source Doctrine Precludes The Set-Off Of Either Premiums Contributed To, Or Benefits Paid Under, Policy GA-23000

Petitioner has confused the distinction between a limited employer indemnity plan and a policy of general hospital and medical insurance coverage which is a fringe benefit to the employee. The former exists when an employer voluntarily undertakes to indemnify itself against potential legal liability; the indemnity plan covers only those injuries sustained on the job for which the employer may be liable at law, is solely for the benefit of the em-

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2 *See Urbaniak*, 424 F. Supp. at 983; *Thomas v. Penn Central Co.*, 379 F. Supp. 24, 27 (W.D. Pa. 1974).

3 *See Urbaniak v. Erie Lackawanna Railway*, 424 F. Supp. at 984.

ployer, and is not a fringe benefit to the employees in part consideration for their labors.[4]

A true indemnity plan is vastly different from the nature and operation of Policy GA-23000. This policy contract, in actuality, exists between the insurer and the employee policy holders. As an economic term of the collective bargaining agreement, the railroad is required to pay premiums to the insurer much as an employer might at the direction of an employee deduct funds from wages and forward them directly to the employee's creditor or own group health insurer.[5] The policy is a fringe benefit provided in part consideration for the employee's services to the railroad and cannot be characterized as a gratuity. Eligibility for benefits is not contingent upon sustaining injuries for which the railroad may be liable at law, and was not voluntarily established by the railroads in an attempt to indemnify against liability under the FELA.[6]

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[4] *See Clark v. Burlington Northern, Inc.*, 726 F.2d 448, 450 (8th Cir. 1984); *Patterson v. Norfolk & Western Railway*, 489 F.2d 303, 308 (6th Cir. 1973); *Haughton v. Blackships, Inc.*, 462 F.2d 788, 791 (5th Cir. 1972); *Russo v. Matson Navigation Co.*, 486 F.2d 1018, 1021 (9th Cir. 1973); *Hall v. Minnesota Transfer Ry.*, 322 F. Supp. 92, 96 (D. Minn. 1971).

[5] *See Patterson v. Norfolk & Western Railway*, 489 F.2d 303, 308 (6th Cir. 1973); *Hall v. Minnesota Transfer Railway*, 322 F. Supp. 92, 96 (D.Minn. 1971).

[6] *See Patterson v. Norfolk & Western Railway*, 489 F.2d at 308; *Hall v. Minnesota Transfer Railway*, 322 F. Supp. at 96; *See also* discussions in *Blake v. Delaware & Hudson Railway*, 484 F.2d 204, 206-07 (2d Cir. 1973); *Lopez v. Southern Pacific Transportation Co.*, 1 Civ. No. 40048 (Cal. Ct. App.

(Continued on following page)

The courts have been careful to point out that a fund does not lose its status as a collateral source simply because the employer/tort-feasor contributes premiums to the fund from which benefits are paid.[7] As the Eighth Circuit recently stated in an FELA action, "[m]edical expenses paid for by insurance are exempt from set-off regardless of whether the employer paid one hundred percent of the insurance premiums." *Clark v. Burlington Northern, Inc.*, 726 F.2d 448, 450 (8th Cir. 1984). The vast majority of federal circuit and district courts adhere to the rule that it is the character of the benefits received, not the source of the funds, which governs whether the collateral source rule applies.[8] Therefore, the Second, Sixth and Eighth Circuits and most other courts have held that the benefits of Policy GA-23000 arise from a collateral source and that the railroads are prohibited from setting off from their liability under the FELA

(Continued from previous page)

1977) (Petitioner's App. at 37a); *Southern Pacific Transportation Co. v. Allen*, 525 S.W.2d 300, 307 (Tex. Civ. App. 1975); and *Russo v. Matson Navigation Co.*, 486 F.2d 1018, 1020-21 (9th Cir. 1973) (pension benefits a fringe benefit and not subject to set off under the Jones Act); *Haughton v. Blackships, Inc.*, 426 F.2d 788, 791 (5th Cir. 1972) (disallowing deduction of maritime pension in mitigation of damages owed under the Jones Act).

[7] *See Blake v. Delaware and Hudson Railway*, 484 F.2d at 206 (2d Cir. 1973); *Patterson v. Norfolk & Western Railway*, 489 F.2d at 308 (6th Cir. 1973); *Haughton v. Blackships, Inc.*, 462 F.2d at 790 (5th Cir. 1972); *Gypsum Carrier, Inc. v. Handelsman*, 307 F.2d 525, 534-35 (9th Cir. 1962); *United States v. Price*, 288 F.2d 448, 450 (4th Cir. 1961); *Hall v. Minnesota Transfer Railway*, 322 F. Supp. at 95 (D. Minn. 1971).

[8] *See* note 7 *supra*.

either the insurance premiums paid to Travelers, or the amounts payable in medical expenses under the policy.[9] The opinion of the Montana Supreme Court in this case is in accord with these decisions.

The policy considerations underlying the collateral source rule have been well established by this Court and the federal courts for many years. The doctrine embraces the principle that a wrongdoer should not benefit by mitigating his responsibility as a tort feasor through a set off of funds available to the injured person from a collateral source.[10] In *Eichel v. New York Central Railway Co.*, 375 U.S. 253, 255-56 (1963), this Court recognized that evidence of an injured employee's collateral benefit entitlement is readily subject to misuse by the jury and would involve the substantial likelihood of prejudicial

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9 *Clark v. Burlington Northern, Inc.* 726 F.2d at 451 (8th Cir. 1984); *Wilcox v. Clinchfield Railroad*, 747 F.2d 1059, 1061 (6th Cir. 1984); *Patterson v. Norfolk & Western Railway*, 489 F.2d at 308 (6th Cir. 1973); *Blake v. Delaware & Hudson Railway*, 484 F.2d at 207 (2nd Cir. 1973); *Urbaniak v. Erie Lackawanna Railway*, 424 F.Supp. at 984 (W.D.N.Y. 1977); *Hall v. Minnesota Transfer Railway*, 322 F.Supp. at 97 (D. Minn. 1971); *Herbst v. Burlington Northern Railroad*, CV-84-51 BLG (D.Mont. April 22, 1985) (Petitioner's App. at 32A); *Lopez v. Southern Pacific Transportation Co.*, 1 Civ. No. 40048 (Cal. App. 1977) (Petitioner's App. at 34A); *Southern Pacific Transportation Co. v. Allen*, 525 S.W. 2d 300, 307 (Tex. Civ. App. 1975).

10 *See Russo v. Matson Navigation Co.*, 486 F.2d at 1020 (9th Cir. 1973); *Haughton v. Blackships, Inc.*, 462 F.2d at 791 (5th Cir 1972); *Grayson v. Williams*, 256 F.2d 61, 65 (10th Cir. 1958).

impact.[11] The Fifth Circuit interpreted *Tipton* and *Eichel* to, ". . . reflect a strong policy against the use of such collateral source evidence in FELA and analogous Jones Act—maritime law seamen's cases."[12] Moreover, the collateral source rule requires the tort feasor to pay but once:

> The question is not whether a windfall is to be conferred, but rather who shall receive the benefit of a windfall which already exists. As between the injured person and the tort feasor, the former's claim is better. This may permit a double recovery, but it does not impose a double burden. *The tort feasor bears only the single burden for his wrong.*
>
> That burden is imposed by society, not only to make the plaintiff whole, but also to deter negligence and encourage due care. (emphasis added).[13]

C. Even If The On-Duty Injury Clause Of Policy GA-23000 Represents An Employer Indemnity Plan, Section 5 Of The FELA Allows The Railroads To Set Off Only The Premiums Paid

As discussed, the issue petitioner fails to recognize is that Policy No. GA-23000 is not an employer indemnity plan. However, even assuming the on-duty injury clause

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11 In *Eichel* it was held the railroad could not set off either amounts it contributed to the Railroad Retirement Fund under 26 U.S.C. § 3221 et seq., nor benefits received. *See also Tipton v. Socony Mobil Oil Co.*, 375 U.S. 34, 35 (1963) (Jones Act.)

12 *Page v. St. Louis Southwestern Railway Co.*, 349 F.2d 820, 822 (5th Cir. 1965).

13 *Russo v. Matson Navigation Company*, 486 F.2d at 1021 (9th Cir. 1973); *Gypsum Carrier, Inc. v. Handelsman*, 307 F.2d at 534 (9th Cir. 1962); *See also Lopez v. Southern Pacific Transportation Co.*, 1 Civ. No. 40048 (Cal. Ct. App. 1977) (Petitioner's App. at 40a).

of the policy creates an indemnity plan,[14] Section 5 of the FELA [45 U.S.C. § 55][15] in explicit terms prohibits a set off in excess of the contributions made by the railroad to the plan.

The forerunner to Section 5 was Section 3 of the first FELA passed by Congress in 1906, which provided in relevant part that, "no *contract* of employment, insurance, relief benefit, or indemnity for injury or death entered into by or on behalf of any employee, nor the acceptance of any such insurance, relief benefit, or indemnity by the person entitled thereto, shall constitute any bar or defense to any action brought to recover damages for personal injuries to or death of such employee. . . ."[16] Thereafter, Congress reviewed the entire Act, with particular attention directed to Section 3 and various state employers' liability acts and their experience with them.

Under the state acts, it was found that employers had engaged in various attempts to contract themselves out of liabilities the acts intended to impose. The states reacted with varying provisions, all of which were directed towards voiding such arrangements.[17] Former Section 3

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[14] *See Southern Pacific Transportation Co. v. Allen,* 525 S.W.2d at 307, which specifically found the on-duty clause of Policy GA-23000 was not an indemnity plan since it affords coverage, "irrespective of the ultimate liability of the employer."

[15] *See* Petitioner's App. at 17a.

[16] 34 Stat. 232 (1906). This Act was declared unconstitutional in *Employer's Liability Cases,* 207 U.S. 463 (1907).

[17] *See Duncan v. Thompson,* 315 U.S. 1, 6 (1942); H. R. Rep. No. 1386, 60th Cong., 1st Sess. 30-75 (1908).

was incorporated verbatim in one of two bills introduced in the Senate, but the bill which survived consideration contained the broader language of the current Section 5 which replaced "contract" with "any contract, rule, regulation, or device whatsoever."[18]

In 1942, this Court found that the rejection of the word "contract" in favor of the language now contained in Section 5, "argues persuasively that Congress wanted Section 5 to have the full effect that its comprehensive phraseology implies."[19] The broad scope of Section 5 was outlined long ago in *Philadelphia, Baltimore & Washington R. Co. v. Schubert,* 224 U.S. 603, 611 (1912) wherein this Court said:

> The evident purpose of Congress was to enlarge the scope of the section, and to make it more comprehensive by a generic, rather than a specific, description. It thus brings within its purview 'any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from *any* liability created by this act.' It includes every variety of agreement or arrangement of this nature * * *[20] (emphasis added).

Congress intended to prohibit attempts to avoid any liabilities created for railroads under the FELA. The foregoing cases establish that Section 5 cannot be con-

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18 *See* Hearings on S. 3080, February 20 3 (1908); and cf. S. Rep. No. 460, 60th Cong., 1st Sess. 4 (1908).

19 *Duncan v. Thompson,* 315 U.S. 1, 6 (1942); *Boyd v. Grand Trunk Western Railroad Co.,* 338 U.S. 263, 265 (1949).

20 Also cited with approval in *Duncan v. Thompson,* 315 U.S. at 40 (1942).

fined to the narrow interpretation suggested by petitioner.

When a fund is not a collateral source, Section 5 does permit a railroad to offset from its liability under the FELA " . . . any sum *it has contributed or paid* to any insurance, relief benefit, or indemnity that may have been paid to the injured employee . . . ." In concise terms, Congress authorized the railroads to receive the benefit of only the amount of their actual contributions to the indemnity or insurance plan.[21] In 1973, the Ninth Circuit recognized that, "[c]learly, the statute [Section 5] does not provide for a set off of benefits received, but rather for a set off of any sum . . . contributed."[22]

Article III, Section A of the Health and Welfare Agreement relied upon by the B.N. purports to permit the railroads to set off the amount of benefits provided under Policy GA-23000—not just the insurance premiums paid to the plan.[23] This is precisely what is proscribed by Section 5. As Circuit Judge Friendly correctly concluded in a concurring opinion: "Under 45 U.S.C. § 55 the railroad is entitled to set off only the premiums, not what the premiums bought. This was recognized as long ago as *Bangor & Aroostook R. Co. v. Jones*, 36 F.2d 886 (1 Cir.

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21 *See Philadelphia, Baltimore & Washington R. Co. v. Schubert*, 224 U.S. at 612; 40 Cong. Rec. 7662 (1906) (remarks of Mr. Gallinger).

22 *Russo v. Matson Navigation Company*, 486 F.2d 1018, 1020 (9th Cir. 1973) (Jones Act, which incorporates Section 5 in 46 U.S.C. § 688).

23 *See* Petitioner's App. at 27a.

1929).''[24] The Montana Supreme Court correctly decided, as have other courts, that the offset provision in the collective bargaining contract exceeds the parameters imposed by federal statute and is void.[25]

The first sentence of Section 5 expressly voids *any* device which enables a railroad to exempt itself from *any* liability under the FELA. By use of an indemnity plan, part or all of an injured employee's claim under the FELA is paid by the plan rather than by the railroad. As a result, the railroad itself is relieved from liability for that portion of the employee's FELA claim. Congress, in drafting the proviso to Section 5, obviously anticipated that the railroads would seek to indemnify themselves against liabilities created under the FELA. Congress faced the issue of what amount of credit should be given the railroads for payments made from an indemnity or insurance plan ''on account of injury'' for which the railroad may be liable under the FELA. The proviso to Section 5 creates a limited exception to voiding such arrangements, but authorizes a maximum set off of only the sums

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[24] *Blake v. Delaware and Hudson Railway*, 484 F.2d at 207 (2d Cir. 1973); *Bangor & Aroostook R. Co. v. Jones*, 36 F.2d at 891; *See* also *Chicago & Alton Railroad Co. v. Wagner*, 239 U.S. 452, 458 (1915); *Lucht v. Chesapeake & Ohio Railway*, 489 F.Supp. 189, 190 (W.D. Mich. 1980).

[25] *See Blake v. Delaware & Hudson Railway*, 484 F.2d at 207; *Herbst v. Burlington Northern Railroad Co.*, CV-84-51 BLG (D.Mont. April 22, 1985) (Petitioner's App. at 33a); *Lopez v. Southern Pacific Transportation Co.*, 1 Civ. No. 40048 (Cal. Ct. App. 1977) (Petitioner's App. at 34a, 40a.) (voiding the same arrangement in a collective bargaining agreement which allowed the railroad a set off for benefits paid from a group disability insurance policy).

the railroad contributes to the indemnity plan. A device of any nature which permits a greater set off to the railroad than that specifically allowed is void as a matter of statutory federal law.[26]

Lastly, petitioner argues that the set off provision in the bargaining agreement came about as a result of the *obiter dictum* set forth in the concurring opinion of Judge Friendly in *Blake v. Delaware & Hudson Railway,* wherein he suggested the railroads include a, " . . . specific provision in the collective bargaining agreement."[27] Judge Friendly did not outline the terms of any such provision, but having acknowledged that a controlling federal statute entitled the railroads to set off only their premium contributions, it is extremely doubtful that he was suggesting a set off arrangement exceeding the parameters of that law.[28] It would seem more probable that such an agreement would be similar to the bargaining arrangement with the non-operating employees which specified the premiums payable for the on-duty injury clause were not wage-equivalents to the employee. This would tend to establish the on-duty injury coverage as an employer indemnity plan rather than as a collateral source benefit to the employee, thereby allowing the railroad to set off the premiums paid in accordance with the proviso to Section 5. Another provision more in keeping with Section 5 would be an agreement that the on-duty coverage be deemed an indemnity plan for the benefit of the employer.

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26 See note 25 *supra*.

27 484 F.2d at 207 (2d Cir. 1973).

28 *Id.*

D. Petitioner's Authorities Distinguished

Petitioner relies upon those authorities cited at notes numbered 16 and 17 of its petition. When the facts of these cases are analyzed, it becomes readily apparent they are distinguishable and not controlling.

Nearly all of these cases involved *non*-operating railroad employees, which caused the courts to conclude that Policy GA-23000 was not a fringe benefit to the employee and outside the scope of the collateral source rule based on the provision in the bargaining agreement not found in ~~this~~ case which provided the amounts paid as premiums were not considered wage equivalents.[29] It should be noted that none of the foregoing cases are from a circuit court or the highest court of any state. These courts also followed a minority position, supported only by a handful of older state court cases, that a fund cannot be considered a collateral source simply because the plaintiff did not directly pay the premiums.[30] Moreover, the cases did not

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[29] *See Nelson v. Penn Central Railroad,* 415 F.Supp. 225, 227 (N.D. Ohio 1976); *Thomas v. Penn Central Company,* 379 F.Supp. 24, 26-27 (W.D. Pa. 1974); *Diaz v. Indiana Harbor Belt Railroad,* Civ. No. H79-13 (N.D. Ind. Dec. 1, 1981) (Petitioner's App. at 42a, n. 3); *Rogers v. Chicago & North Western Transportation Co.,* 375 N.E.2d 952, 958 (Ill. App. 1978).

[30] *See Thomas v. Penn Central Company,* 379 F.Supp. at 25-26; *Rogers v. Chicago & North Western Transportation Co.* 375 N.E.2d at 958.

consider either the set off provision in the bargaining agreement or the application of Section 5.[31] In the unreported federal district court case cited by petitioner, the plaintiff apparently did not argue to the court that the set off provision in the bargaining agreement exceeded the scope of the proviso to Section 5.[32]

Petitioner offers *Thomas v. Humble Oil & Refining Co.*[33] as evidence of "diversity of interpretation" among the courts. *Humble Oil* involved a shipowner's disability benefit plan as a supplement to maritime maintenance under the Jones Act.[34] The case did not involve the GA-23000 policy, and predated all of those cases which have. Similar to the railroad's bargaining agreement with the *non*-operating employees, the agreement in *Humble Oil* stated that no contribution to the plan was made by the employees.[35] It also appears from the opinion that no insurance premiums were paid but that all benefits emanating from the fund were contributed by the shipowner, in which case Section 5 would allow a set off of benefits paid. *Humble Oil* has since been limited by later authorities as not involving a fringe benefit plan for employees, but a voluntary employer indemnity plan created solely

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31 *See Nelson v. Penn Central Railroad*, 415 F.Supp. 225 (N.D. Ohio 1976); *Rogers v. Chicago & Northwestern Transportation Co.*, 375 N.E.2d 952 (Ill. App. 1978).

32 *Diaz v. Indiana Harbor Belt Railroad*, Civ. No. H79-13 (N.D. Ind. Dec. 1, 1981) (Petitioner's App. at 45a).

33 420 F.2d 793 (4th Cir. 1970).

34 *Id.* at 794.

35 *Id.*

for the benefit of the employer and written to cover only those injuries for which the employer might be liable by law.[36]

Wagner v. Reading Co.[37] was also an early case which only briefly addressed the set off issue in a foot-note without reviewing either relevant case law or Section 5.[38] The opinion did not mention whether Policy GA-23000 or similar coverage was involved, or if the coverage was instead limited to indemnifying the railroad for liabilities under the FELA.[39] Allowance of the set off was premised on the finding that whatever insurance was involved was not a collateral source.[40] *Wagner* has since been limited to the situation where the railroad is the insured under the policy —not the injured employee as is the cause with Policy GA-23000.[41]

What petitioner has done is collect a variety of cases involving distinguishable factual circumstances to incorrectly suggest that inconsistent results have been achieved in the lower courts. It is not only unnecessary but legally impossible to arrive at a single decision which will antici-

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36 *See Russo v. Matson Navigation Co.*, 486 F.2d 1018, 1021 at n.1 (9th Cir. 1973); *Haughton v. Blackships, Inc.*, 462 F.2d 788, 791 (5th Cir. 1972); *Hall v. Minnesota Transfer Railway*, 322 F.Supp. 92, 96-97 (D.Minn. 1971).

37 428 F.2d 289 (3d Cir. 1970).

38 *Id.* at 292, n. 7.

39 *See Hall v. Minnesota Transfer Railway Co.*, 322 F.Supp. at 97.

40 *Wagner*, 428 F.2d at 292, n. 7.

41 *See Patterson v. Norfolk & Western Railway*, 489 F.2d 303, 308 (6th Cir. 1973).

pate and resolve all divergent factual situations. This is particularly true with the collateral source rule:

> It is incorrect to analyze the ambit or boundaries of the collateral source rule in the context of a search for a single applicable rule. The application or non-application of the rule encompasses many different situations and each one must be analyzed separately.[42]

II. THE OPINION BELOW DOES NOT CONFLICT WITH THIS COURT'S DECISION IN LIEPELT

Following the rationale of cases decided after *Liepelt*, the court below held that any error associated with the trial court's failure to instruct regarding the effect of income taxes was harmless in this case.[43] However, there is no precedential value in connection with this holding since the court required that the instruction be given in the future.[44]

A. This Court Has Denied Certiorari Review Of Several Cases Applying The Harmless Error Rule Since Liepelt

Contrary to the argument of petitioner, application of the harmless error rule does not contravene the holding

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[42] *See Feeley v. United States*, 337 F.2d 924, 927-28 (3d Cir. 1964).

[43] *Anderson v. Burlington Northern, Inc.*, — Mont. —, 709 P.2d 641, 646 (1985); Petitioner's App. at 9a. Ordinarily, this Court denies certiorari to review evidence or the inferences drawn therefrom. *See N.L.R.B. v. Pittsburgh S.S. Co.*, 340 U.S. 498, 502 (1951).

[44] *Anderson*, 709 P.2d at 646-47, Petitioner's App. at 9a.

in *Liepelt.* The rule has a long history of approval by this Court.[45] An error will not be reversed unless it affects the substantial rights of the complaining party.[46] Jury instructions are subject to the rule, and it is the appellant's burden to establish the prejudicial effect of the trial court's refusal to give a requested instruction.[47] The extent of the error is evaluated in light of the verdict.[48] The harmless error rule is also based on federal law.[49]

In the present case, the jury awarded Mr. Anderson $195,000 for *all* damages sought, including those for pain and suffering for the permanent injuries to his neck which required an anterior fusion. That award was $45,000 less than the $240,000 in loss of just past and future earnings established by Anderson's economist.[50]

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45 *Pugh v. McCormick,* 81 U.S. (14 Wall.) 361 (1871).

46 *United States v. Borden Co.,* 347 U.S. 514 (1954); *McLanahan v. Universal Insurance Co.,* 26 U.S. (1 Pet.) 170 (1828).

47 *Meyers v. Union Pacific Railroad Co.,* 738 F.2d 328, 330 (8th Cir. 1984).

48 *Brewer v. Jeep Corp.,* 724 F.2d 653, 656 (8th Cir. 1983).

49 28 U.S.C. § 2111 (1982).

50 *Anderson v. Burlington Northern, Inc.,* — Mont. —, 709 P.2d 641, 646 (1985); Petitioner's App. at 9a. Respondent objected to the admission of any testimony from B.N.'s annuity broker on the issue of lost earnings, since he lacked qualifications in the field of economics and was not competent to testify regarding growth and discount rates. App. at 1. *See Jones & Laughlin Steel Corp v. Pfeifer,* 462 U.S. 523 (1983). Recently, the Ninth Circuit held that the same annuity broker's testimony was properly excluded. Since he was not qualified to testify as to the appropriate inflation rate and plaintiff's economic loss, his opinion on the cost of various annuities would be irrelevant. Further, the

(Continued on following page)

In *Flanigan v. Burlington Northern, Inc.*,[51] an Eighth Circuit case relied on by the court below,[52] the court likewise found the jury did not award an amount clearly in excess of plaintiff's proven damage figure. Chief Judge Donald P. Lay, writing for the court pointed out that:

> . . . the prejudicial effect of a failure to give a nontaxability instruction should be decided on the existence of evidence that the jury did, in fact, operate under a false impression of the tax laws.[53]

Judge Lay distinguished the factual situation presented in *Liepelt:*

> . . . The *Liepelt* jury awarded the plaintiff $775,000 whereas the plaintiff's own economist testified to lost earnings of only $302,000. This large disparity between the evidence and the verdict greatly influenced the Supreme Court in deciding that the failure of the trial court to give a nontaxability instruction was prejudicial error.[54]

(Continued from previous page)

jury could be misled by concluding that the plaintiff had to purchase an annuity. *Taylor v. Burlington Northern, Inc.*, No. 84-3764 (9th Cir. April 18, 1986) (available on West law). Moreover, the jury award of $195,000 for *all* damages cannot be deemed inflated or excessive when the annuity broker's *lowest* estimate for just loss of earnings was $115,000.

51 632 F.2d 880 (8th Cir. 1980), *cert. denied,* 450 U.S. 921 (1981).

52 The court followed its holding in *Dallas v. Burlington Northern, Inc.*, — Mont. —, 689 P.2d 273 (1984) which relied on *Flanigan. See Dallas,* 689 P.2d at 278. The petitioner did not seek certiorari review of the Montana Supreme Court's decision in *Dallas.*

53 *Flanigan v. Burlington Northern, Inc.*, 632 F.2d at 890.

54 *Id.*

The *Liepelt* court found from this enormous disparity that it was likely the jury inflated its verdict on a mistaken belief that a large part of the recovery would go toward payment of taxes.[55] The Second Circuit,[56] based on a Michigan Law School study,[57] concluded that juries generally do not increase recoveries on the erroneous belief they will be taxed.

Moreover, *Liepelt* involved a wrongful death claim and plaintiff's proof centered on the loss of decedent's pecuniary earnings and the net amount which could be contributed to his dependents.[58] *Flanigan* and the instant case involve injury claims, also entitling plaintiffs to compensatory damages for pain and suffering and medical expenses.[59]

Certiorari review was denied in *Flanigan*, as well as in three other appellate court decisions applying the harmless error rule since *Liepelt*.[60] The court below found the

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55 *Norfolk & Western Railway v. Liepelt*, 444 U.S. at 497.

56 *See McWeeney v. New York, New Haven and Hartford Railroad*, 282 F.2d 34, 39 and n. 15 (2d Cir. 1960); *Rouse v. Chicago, R.I. and P.R.R.*, 474 F.2d 1180, 1183-84 n. 3 (8th Cir. 1973).

57 Kalven, A report on the Jury Project, Conference on the Aims and Methods of Legal Research, University of Michigan Law School, 167-68 (1957).

58 *Norfolk & Western Railway v. Liepelt*, 444 U.S. at 497.

59 *See Flanigan v. Burlington Northern, Inc.*, 632 F.2d at 890.

60 *Flanigan v. Burlington Northern, Inc.*, 632 F.2d 880, 890 (8th Cir. 1980), *cert. denied*, 450 U.S. 921 (1981); *Vanskike v. ACF Industries*, 665 F.2d 188, 206-07 (8th Cir. 1981), *cert. denied*, 455 U.S. 1000 (1982); *Faulkenberry v. Kansas City Southern Railway*, 661 P.2d 510, 512-13 (Okla. 1983), *cert.*

(Continued on following page)

same rationale applicable to the facts of this case and no review of the decision is required.

B. Certiorari Review Is Unnecessary Since The Decision Below Requires The Trial Courts To Give The Liepelt Instruction In The Future

In its opinion, the Montana Supreme Court overruled 26 years of prior case law[61] in stating:

> . . . [W]e are compelled to comment that in the future it would be better for a trial court to give a nontaxability instruction to the jury.
>
> * * *
>
> We make this comment because of trial courts' reliance on previous holdings by this court that future income tax liability is an improper consideration in formulating an award for loss of future earnings.[62]

There is no precedent established by this case in conflict with *Liepelt* which requires certiorari review.

(Continued from previous page)

denied, 464 U.S. 850 (1983); *Marlow v. Atchison, Topeka & Santa Fe Railway*, 671 P.2d 438, 442-43 (Colo. Ct.App. 1983); *Caribe Tugboat v. Duffy*, 427 So.2d 227 (Fla. Dist. Ct.App. 1983) (per curiam), *cert. denied*, 464 U.S. 1041 (1984); *Marynik v. Burlington Northern, Inc.*, 317 N.W.2d 347, 351 (Minn. 1982).

61 *See Torchia v. Burlington Northern, Inc.*, 174 Mont. 83, 568 P.2d 558 (1977); *Bracy v. Great Northern Railway Co.*, 136 Mont. 65, 343 P.2d 848 (1959).

62 *Anderson v. Burlington Northern, Inc.*, 709 P.2d at 646-47; Petitioner's App. at 9a-10a.

C. The Issue As To The Admissibility Of Evidence Regarding After Tax Earnings Was Not Passed Upon In The Decision Below

The Montana Supreme Court did not address the trial court's decision not to admit evidence showing the amount in income taxes plaintiff paid over the years 1974 through 1982. It is the settled practice of this Court to refrain from deciding issues not passed upon in the highest court of the state whose decision this court is called upon to review.[63]

Further, the *Liepelt* decision clearly stated it was not creating a rigid rule that all evidence of after tax earnings, in every form, is *per se* admissible. The Court elaborated in a footnote:

> This is not to say, however, that introduction of such evidence must be permitted in every case. If the impact of future income tax in calculating the award would be *de minimis*, introduction of the evidence may cause more confusion that it is worth. Cf. Fed. Rule Evid. 403.[64]

As a Colorado Appellate Court noted, " . . . the *Liepelt* case does not establish a rule that any evidence, in whatever form, which is offered as a basis for calculating the effect of taxes on lost future earnings is *per se* admissible."[65]

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[63] *Illinois v. Gates*, 462 U.S. 213, 219 (1983); *State Farm Automobile Insurance Co. v. Duel*, 324 U.S. 154, 160 (1945); *McGoldrick v. Compagnie Generale*, 309 U.S. 430, 435-36 (1940).

[64] *Liepelt*, 444 U.S. at 494 n. 7.

[65] *Marlow v. Atchison, Topeka & Santa Fe Railway*, 671 P.2d 438, 442 (Colo. Ct.App. 1983).

In this case, B.N. offered to show through cross-examination of plaintiff's economist that plaintiff was taxed at an average annual rate of 17 percent based on variable earnings he had over the years 1974 through 1982.[66] That time period included several years prior to his injury. Petitioner did not produce an expert economist of its own, and there was no competent evidence to establish what the rate of taxation would be on lost future earnings. In *Marlow v. Atchison, Topeka & Santa Fe Railway,* the same evidence was rejected where there was no proof to establish the rate of taxation on projected earnings plaintiff would lose as a result of his injury.[67] Moreover, any error in refusing its admission was harmless.

The trial courts must be afforded latitude to determine the admissibility of specific types of evidence. The guidelines established by *Liepelt* must be applied by the trial courts.[68] Trial courts are traditionally allowed broad discretion in their determinations regarding the admissibility of evidence.[69]

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66 Petitioner's App., 21a-4a.

67 671 P.2d 438, 442 (Colo. Ct.App. 1983).

68 *Flanigan v. Burlington Northern, Inc.,* 632 F.2d 880, 884 (8th Cir. 1980), *cert. denied,* 450 U.S. 921 (1981).

69 *Id.* (citing *Lavender v. Kurn,* 327 U.S. 645 (1946).

CONCLUSION

For the foregoing reasons, a writ of certiorari should not be issued to review the judgment and opinion of the Supreme Court of the State of Montana.

Respectfully submitted,

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May 14, 1986

APPENDIX

EXCERPTS FROM THE TRIAL TRANSCRIPT

* * * *

(p. 506) Mr. Koolen: Mr. Faulhaber, if you would come forward and be sworn, we will let you take the witness stand up on the left.

THOMAS JOSEPH FAULHABER, being first duly sworn, testified as follows:

Direct Examination by Mr. Koolen:

Q. Would you tell us your name, please, sir?

A. Thomas Joseph Faulhaber.

Q. And where do you live?

A. Edina, Minnesota.

(p. 507) Q. What is your occupation, Mr. Faulhaber?

A. I am an annuity broker.

Q. And what is your educational background and training?

A. I graduated from college with a Liberal Arts Degree. My major was philosophy. I continued on with four more years of college, and my degree there was theology. I was ordained to the ministry in 1865, and I was in the ministry for seven years until 1972. In 1974 I entered the life insurance industry with a company called Con-

necticut Mutual Life, and I have been in the insurance industry specializing in annuities for the past ten years.

Q. Now, you say that you are an annuities broker specializing in annuities. Could you tell us exactly what you do in that capacity?

A. All right. By the term broker, it simply means that I am not locked into any one particular life insurance company that issues annuities. I have access by having contracts with many of the major life insurance companies in our country that issue annuities. So as a broker, I can price annuities out from various companies, and then select the most competitive company at that particular time.

Q. And if your business, then, is annuities, could you explain for us exactly what annuities are?

(p. 508) A. First of all, an annuity is a product that is sold by a life insurance company. Once the contract or policy has been issued from an individual, from that point on, the obligation and the responsibility of the life insurance company is to make a series of payments back to the purchaser, which we call the annuitant--that's the one receiving those payments.

Q. Mr. Faulhaber, then have you taken courses in economics?

A. No, I haven't.

Q. Have you obtained any degrees in any of your educational dealings with the field of economics in any way?

A. I have not.

Q. Do you have, then, any opinions about economic theory or its application?

A. No. I would have no opinions on economic theories or their possible applications.

Q. Are you able to work with economic growth rates and discount rates and explain them?

A. No, that's not my field.

Q. Then in your field of annuities, did you, at my request, prepare several alternate annuity programs for Jack Anderson?

A. Yes, I did.

(p. 509) Mr. Koolen: Your Honor, may we approach the bench?

(WHEREUPON, the following proceedings were held outside the hearing of the jury.)

Mr. Prindle: Your Honor, I want to take this opportunity to make an objection and put it on the record based on Mr. Faulhaber's qualifications—based on Mr. Faulhaber's lack of qualifications, lack of training as far as economics, lack of training or anything that would qualify him as an expert as to growth rates, and also based on the law of the State of Montana that indicates that when determining damages for future loss, the person must take into consideration growth rates and things of this nature. We are objecting to his testifying in this matter based on his qualifications. He is not an expert to testify in this, and he indicated he doesn't know anything about growth rates.

The Court: No, but he can testify if a person purchased an annuity at a certain price what they would receive as per income, and that's all it's going to be. He is not going to talk about all of the rates or anything else.

* * *

Supreme Court, U.S.
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No. 85-1544

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

BURLINGTON NORTHERN, INC.,
Petitioner,

v.

JACK D. ANDERSON,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Montana

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES i

I. RESPONDENT'S BRIEF DEMONSTRATES THE NEED FOR SUPREME COURT REVIEW OF THE VALIDITY OF THE RAILROAD INDUSTRY'S COLLECTIVE BARGAINING AGREEMENT DIRECTING SET-OFF OF PREVIOUSLY PAID MEDICAL EXPENSES 1

II. RESPONDENT HAS ALSO IGNORED THE CONFLICT WITH RESPECT TO THE PREJUDICIAL IMPACT ON AN FELA JURY AWARD OF A FAILURE TO FOLLOW THIS COURT'S TEACHINGS IN *LIEPELT* 6

TABLE OF AUTHORITIES

CASES

Blake v. Delaware & Hudson Railway, 484 F.2d 204 (2d Cir. 1973) 4

Clark v. Burlington Northern, Inc., 726 F.2d 448 (8th Cir. 1984) 3

Congress of Industrial Organizations v. McAdory, 325 U.S. 472 (1945) 8

Eichel v. New York Central Railway, 375 U.S. 253 (1963) 4

Gardiner v. Sea-Land Service, Inc., Nos. 84-2354, 84-2547 (9th Cir., April 8, 1986) 5

Illinois v. Gates, 462 U.S. 213 (1983) 8

Marlow v. Atchison, Topeka & Santa Fe Railway, 671 P.2d 438 (Colo. Ct. App. 1983) 8

McGoldrick v. Compagnie Generale Transatlantique, 309 U.S. 430 (1940) 8

Norfolk & Western Railway v. Liepelt, 444 U.S. 490 (1980) ..... *passim*

Oltersdorf v. Chesapeake & Ohio Railroad, 404 N.E.2d 320 (Ill. App. Ct. 1980), *cert. denied*, 450 U.S. 920 (1981) 7

TABLE OF AUTHORITIES—Continued

Page

St. Louis Southwestern Railway v. Dickerson, 105 S. Ct. 1347 (1985) 7
Thomas v. Humble Oil & Refining Co., 420 F.2d 793 (4th Cir. 1970) 3
Thomas v. Penn Central Co., 379 F. Supp. 24 (W.D. Pa. 1974) 3
Wagner v. Reading Co., 428 F.2d 289 (3d Cir. 1970) 3
Wilson v. Cook, 327 U.S. 474 (1946) 8

STATUTES

45 U.S.C. § 55 (1982) 3

MISCELLANEOUS

Report of the Tort Policy Working Group on the Causes, Extent and Policy Implications of the Current Crisis in Insurance Availability and Affordability (Feb. 1986) 6

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REPLY OF PETITIONER

I. RESPONDENT'S BRIEF DEMONSTRATES THE NEED FOR SUPREME COURT REVIEW OF THE VALIDITY OF THE RAILROAD INDUSTRY'S COLLECTIVE BARGAINING AGREEMENT DIRECTING SET-OFF OF PREVIOUSLY PAID MEDICAL EXPENSES

In its petition for certiorari, Burlington Northern Railroad Company ("BN") argued that review of the decision below was warranted because that decision exemplified a recurring conflict concerning the validity of a provision of a nationwide collective bargaining agreement directing that medical expenses advanced by employers be set-off in FELA cases.

In the Brief in Opposition to the Petition ("Opp. Cert."), respondent does not dispute the importance,

financial magnitude and recurring nature of the issue, does not reconcile the conflicting opinions, and does not justify the lower court's decision that the collective bargaining agreement is void. Instead, respondent vigorously argues that the medical payments in this case should be characterized as fringe benefits, that other courts have found such payments to be "collateral source" income, and that the language of the agreement at issue was not adequate to show the payments are not collateral source income. These arguments not only fail to address the analysis presented in the petition but, by mirroring the disagreement and confusion in the case law, actually illustrate the need for Supreme Court review.

Respondent argues that the divergent cases can be explained by a distinction between operating and non-operating employees. This assertion is incorrect. As respondent recognizes, as least since 1968 the same insurance plan has been applied to all union employees, operating and non-operating, on the same terms.[1] Respondent's distinction between operating and non-operating employees does not explain the conflict and is, in any event, illogical and unworkable.[2]

Failing to resolve the conflict, respondent argues that the decision below is consistent with the weight of au-

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[1] *See* Opp. Cert. at 4. Contrary to respondent's suggestion, when the operating employee unions were included in the Health and Welfare plan beginning in 1964, the parties *did* understand and explicitly stated that the on-duty injury coverage was *not* provided as a wage-equivalent. *See* Letter from National Railway Labor Conference to L.J. Wagner and C. Luna (March 26, 1964), *cited in* Brief of the Association of American Railroads, *et al.*, as *Amici Curiae* at 7 n.6, App. at 15a.

[2] Respondent also incorrectly describes Travelers' Group Policy GA-23,000 as a payroll-deduction plan. *See* Opp. Cert. at 5. The *amici curiae* provide a more accurate description. *See* Brief *Amici Curiae* at 7-8. As a general matter it is not the employees themselves but the railroads and rail employee unions that make up the "Policyholder" for GA-23,000.

thority finding on-duty injury payments under GA-23,000 to be "collateral source" benefits. The decision singled out in respondent's text, however, *Clark v. Burlington Northern, Inc.*, 726 F.2d 448 (8th Cir. 1984), *see* Opp. Cert. at 6, does not support his position. The dictum quoted by respondent merely recites the conventional principle that the nominal payment of insurance premiums by an employer does not end the inquiry into whether the insurance is "collateral." The *Clark* court went on to give effect to the parties' contractual agreement that medical expense payments would offset FELA damages. It rejected arguments similar to those made by respondent, observing "[t]he employer's manifest intent to avoid double liability in offering disability plans must be respected if the collateral source rule is not to swallow up 45 U.S.C. § 55 at the ultimate expense of employees." 726 F.2d at 451.

The remainder of respondent's cases are nothing more than decisions characterizing advance payment of medical expenses as collateral sources of income to employees. As the petition pointed out, there is also a substantial body of case law taking the opposite view.[3] It was be-

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[3] *See Petition* at 11 n.16. Respondent valiantly attempts to distinguish these cases, but in so doing confuses the conflicting rulings that served as a backdrop to the present controversy with the conflicting rulings on which the petition is based. *See, e.g.*, Petition at 13 n.20, 14 nr.22 & 23. For example, respondent discusses *Thomas v. Humble Oil & Refining Co.*, 420 F.2d 793 (4th Cir. 1970), but fails to note that in that case the Fourth Circuit declared a collective bargaining agreement analogous to the 1975 Health and Welfare Agreement to be *valid* under Section 5 of the FELA. Similarly, respondent attempts to minimize the significance of *Wagner v. Reading Co.*, 428 F.2d 289 (3d Cir. 1970), but must concede that this case states the law of the Third Circuit. *See Thomas v. Penn Central Co.*, 379 F. Supp. 24 (W.D. Pa. 1974). In all, at least three circuits (the Third, Fourth and Eighth), as well as a number of prominent district court decisions, have reached results clearly in conflict with the decision below and like decisions. *Compare* Petition at 13 n.20 *with id.* at 14 n.22 & 23.

cause of this apparent confusion in the courts concerning the nature of on-duty injury payments under GA-23,000 that the parties felt the need to clarify their intent through the 1975 Health and Welfare Agreement at issue in this case.

Respondent's brief largely overlooks the actual issue decided by the court below and presented by this petition —whether such a clarifying statement by the parties in a collective bargaining agreement violates Section 5 of the FELA. Significantly, respondent does not attempt to defend the lower court's ruling on its own terms, but advances several other theories that purportedly justify the result. First, respondent argues at some length that Section 5, as revised in 1908, was meant to encompass a wide variety of devices or arrangements even if not labeled "contracts." *See* Opp. Cert. at 9-10. As there is no dispute that a "contract" (*i.e.*, a collective bargaining contract) is involved in this case, this argument is wholly superfluous.[4]

Second, respondent suggests that set-off should be denied in this case because the parties did not explicitly characterize the medical expense payments as "indemnity" or "non-wage equivalent." *See, e.g.*, Opp. Cert. at 4, 11, 13, 15. Importantly, respondent thus acknowledges that whether certain employee "benefits" are to be deemed collateral is a matter that is legitimately within the control of the negotiating parties.[5] Neither FELA nor the

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[4] Also irrelevant is respondent's citation of *Eichel v. New York Central Railroad*, 375 U.S. 253 (1963). The *Eichel* court disallowed an offset for retirement benefits paid by the Railroad Retirement Fund on the grounds that the benefits received were "not directly attributable to the contribution of the employer," and because this federal program was "substantially a Social Security Act for employees of common carriers." Neither of these factors is applicable in this case.

[5] That principle, highlighted in Judge Friendly's concurrence in *Blake v. Delaware & Hudson Railway*, 484 F.2d 204 (2d Cir. 1973), was recently re-affirmed in an analogous context by the Ninth Cir-

common law collateral source doctrine, however, requires ritual incantation of magic words. Moreover, it is difficult to imagine how the parties could have expressed their intent any more clearly than by the set-off language in this Agreement and surrounding correspondence.

Having conceded that Section 5 does not create a blanket prohibition forbidding set-offs to account for advance payments by a railroad defendant, respondent argues that Section 5 and its proviso allow a maximum set-off of "the premiums, not what the premiums bought." *See* Opp. Cert. at 11. As petitioner has described, this concept is an erroneous judicial gloss that has been uncritically accepted and repeated by several courts. *See* Petition at 18-20. Respondent has failed to respond to any of the legislative history pointed out by petitioner, which establishes that an employer is entitled to a full offset where the employer bore the entire cost of funding the plan.

Moreover, the "premium paid not benefits bought" theory is impractical as a realistic matter and nonsensical as a matter of policy. As the *amici curiae* describe, the funds used for on-duty injury expenses are contributed exclusively by the railroads and in lump sums. *See* Brief *Amici Curiae* at 7-8; Petition at 19-20. Any requirement that the railroads prove the "premiums" paid with respect to particular employees would simply be incongruous and unmanageable in light of the structure of the policy. Furthermore, even if such per-worker or per-injury "premiums" could be identified, allowing credit only for such premiums would give railroads no incentive to provide such plans at all, and employees would lose the benefit of prompt reimbursement for medical services.

Respondent offers the final argument that these cases involve divergent factual situations, and that "it is not only unnecessary but legally impossible to arrive at a

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cuit in *Gardiner v. Sea-Land Service, Inc.*, Nos. 84-2354, 84-2547 (9th Cir., April 8, 1986) (collective bargaining agreement setting low rate for maintenance does not abrogate this maritime right but seeks to "preserve it as part of the negotiating process").

single decision which will anticipate and resolve" these cases. *See* Opp. Cert. at 16-17. This assertion ironically dramatizes the need for Supreme Court review. In reality, the issue posed by these cases involves relatively few material facts and in all of the cases cited by both parties these material facts are identical. Most of the cases even involve the same insurance documents. The failure of the courts to adopt any consistent approach, coupled with their rejection of the parties' efforts to resolve the issue by a nationwide collective bargaining agreement, has left this entire area of the law in complete disarray. Supreme Court review is necessary to clarify the proper approach to this constantly recurring problem and to permit the development of mutually satisfactory ways of assisting injured employees.[6]

II. RESPONDENT HAS ALSO IGNORED THE CONFLICT WITH RESPECT TO THE PREJUDICIAL IMPACT ON AN FELA JURY AWARD OF A FAILURE TO FOLLOW THIS COURT'S TEACHINGS IN *LIEPELT*

BN's petition argued that Supreme Court review of this case was also necessary to resolve a conflict between a large number of appellate court decisions concerning

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[6] As the *amici* have pointed out, this case also presents a timely opportunity to reassess the collateral source rule for federal question cases. *See* Brief *Amici Curiae* at 11 n.17. The Attorney General's Tort Policy Working Group recently concluded:

> In an era when collateral sources of income were financed largely by plaintiff himself, the collateral source rule may have been sensible. Today, however, when many collateral sources are provided or subsidized by the government or by third parties (such as employers, who often are required by law to provide certain collateral benefits), the traditional justification is called into question. Increasingly, the collateral source rule simply permits a windfall recovery by the plaintiff.

See Report of the Tort Policy Working Group on the Causes, Extent and Policy Implications of the Current Crisis in Insurance Availability and Affordability, 71 (Feb. 1986).

the prejudicial effect of a trial court's failure to instruct a jury on the tax consequences of an FELA damage award. *See* Petition at 23-26. Throughout his Brief in Opposition, respondent assumes the very issue that remains in conflict—whether to apply a harmless error standard for reviewing a lower court's refusal to give a *Liepelt* [7] instruction, as was done in this case, or to hold that such a ruling is inherently prejudicial.

While respondent correctly notes that this Court has denied certiorari review in a number of cases applying a harmless error standard when a nontaxability instruction is refused by a trial court,[8] such a statement proves too much. The fact that this issue continues to be brought to the attention of this Court demonstrates the recurring nature of the dispute and the need for a definitive ruling. Absent clarification by the Court of the import of its decision in *Liepelt*, lower courts will remain divided on this important FELA damages question.[9]

Moreover, in his zeal to find support for the Montana Supreme Court's erroneous rulings, respondent has engaged in precisely the kind of speculation that this Court sought to eliminate in *Liepelt*. Respondent acknowledges that BN presented evidence tending to show lost earnings as low at $115,000,[10] which was well below the jury's ver-

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[7] *Norfolk & Western Railway v. Liepelt*, 444 U.S. 490 (1980).

[8] *See* Opp. Cert. at 17-21 & n.60. *See also Oltersdorf v. Chesapeake & Ohio Railroad*, 404 N.E.2d 320 (Ill. App. Ct. 1980), *cert. denied*, 450 U.S. 920 (1981), where certiorari review was denied of a state appellate court decision holding that the refusal to give a requested nontaxability instruction required a new trial on damages without any analysis of the nature or extent of the error.

[9] Just last term the Court summarily reversed a lower court decision in an FELA damage case after twice denying certiorari review on precisely the same issue. *See St. Louis Southwestern Railway v. Dickerson*, —— U.S. ——, 105 S. Ct. 1347 (1985).

[10] *See* Opp. Cert. at 19 n.50. The fact that respondent objected to the introduction of this evidence is irrelevant for purposes of

dict of $195,000. While respondent would have the Court attribute this difference to damages for pain and suffering, it is equally likely that the jury artificially inflated some portion of this amount to account for income taxes.[11] In any event, such speculation as to the deliberations of the jury merely highlights the difficulty in applying a harmless error standard to these cases. *See Liepelt*, 444 U.S. at 497-98 (reversing a lower court "[w]hether or not this speculation is accurate").

Finally, respondent would have this Court refrain from reviewing even the lower court's refusal to follow the second prong of *Liepelt* concerning the taxes payable on respondent's lost earnings because the Montana Supreme Court did not address this issue on appeal. Respondent does not dispute the fact that BN properly raised this matter in its original appeal to the Montana Supreme Court and again on rehearing. *See* Petition at 27. It is well settled that this Court's reviewing powers can be invoked whenever a federal question is either "pressed" or "passed upon" in the courts below.[12] To hold otherwise would substantially undermine this Court's jurisdiction by allowing a lower court to avoid review of

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BN's appeal and petition for writ of certiorari. The trial judge denied this objection and permitted the jury to consider this evidence. The question whether the jury's award was artificially inflated is thus properly framed for this Court.

[11] At trial, BN proffered income tax returns which revealed that between 1974 and 1982 respondent paid approximately 17 percent of his gross earnings in taxes. *See* Petition at App. 21a-23a. Clearly, such an amount cannot be deemed *de minimis* or harmless as suggested in respondent's brief. *See* Opp. Cert. at 22-23. Moreover, the offer of proof in this case—actual tax payments—was of much greater relevance than the evidence proffered in *Marlow v. Atchison, Topeka & Santa Fe Railway*, 671 P.2d 438 (Colo. Ct. App. 1983), where only income tax withholding figures were adduced.

[12] *See Illinois v. Gates*, 462 U.S. 213, 217-20 (1983); *Wilson v. Cook*, 327 U.S. 474, 480 (1946); *Congress of Industrial Organizations v. McAdory*, 325 U.S. 472, 477 (1945); *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434-35 (1940).

its decisions by consciously ignoring claims of error. In this case, BN vigorously "pressed" its claim of error below and therefore should be entitled to consideration of its petition on the merits.

Contrary to the teachings of *Liepelt*, the Montana Supreme Court has allowed an FELA verdict to be rendered which grossly overcompensates a plaintiff for lost past and future earnings. Not only was the jury allowed to consider only evidence of gross earnings, but it also was not made aware that its judgment would be tax free. Absent review of the decision below by this Court, the conflict will remain unresolved and juries will continue rendering inflated FELA damage awards in contravention of the express holdings in *Liepelt*.

Respectfully submitted,

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No. 85-1544

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

BURLINGTON NORTHERN, INC.,
Petitioner,

v.

JACK D. ANDERSON,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Montana

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MOTION FOR LEAVE TO FILE A BRIEF *AMICI CURIAE* AND BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS, NATIONAL RAILWAY LABOR CONFERENCE, AND NATIONAL ASSOCIATION OF RAILROAD TRIAL COUNSEL AS *AMICI CURIAE* IN SUPPORT OF THE PETITION

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MOTION OF THE ASSOCIATION OF AMERICAN RAILROADS, NATIONAL RAILWAY LABOR CONFERENCE, AND NATIONAL ASSOCIATION OF RAILROAD TRIAL COUNSEL FOR LEAVE TO FILE A BRIEF *AMICI CURIAE*

The Association of American Railroads ("AAR"), National Railway Labor Conference ("NRLC"), and National Association of Railroad Trial Counsel ("NARTC") respectfully move this Court for leave to file the attached Brief *Amici Curiae*.[1] The AAR and supporting railroad organizations have limited such requests to instances where issues of overriding concern to the industry are involved and such requests have generally been granted.[2]

[1] Petitioner has consented to the filing of the brief. The letter signifying this consent has been filed with the Clerk. Respondents have withheld consent. The brief is timely filed under the Rules of the Supreme Court which require filing within the time allowed for the filing of the brief in opposition (Rule 36.1). Pursuant to the extension of time requested by Respondent and granted by this Court, respondent's brief in opposition is due on May 16, 1986.

[2] *See Burlington Northern Inc. v. Herold*, No. 85-186 (filed August 30, 1985); *Burlington Northern Railroad Company v.*

The Court has generally permitted the participation of industry associations in cases such as this, which involve issues of special concern to the industry as a whole.[3]

The AAR is the trade association for the nation's railroads. Its members employ approximately ninety-four percent of the workers, operate approximately ninety-two percent of the trackage, and account for approximately ninety-seven percent of the freight revenues of all railroads in the United States.[4] AAR represents its members before courts, agencies and the U.S. Congress when matters of common concern are at issue.

The NRLC, whose members include almost all of the nation's Class I railroads, represents the industry both in national collective bargaining pursuant to the Railway Labor Act and in regard to other labor-management relations problems that are of concern to the railroads generally. The NARTC is a voluntary, unincorporated nonprofit organization composed of over 1,200 trial lawyers who represent all of the significant railroads operating throughout the United States.

The decision of the Montana Supreme Court in this case will have a serious adverse effect on the railroad industry as a whole. In its ruling, the Montana Supreme Court, based on a misconstruction of Section 5 of the Federal Employers' Liability Act ("FELA") (which section prohibits a railroad from exempting itself from

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Cosby, No. 84-1313 (filed March 18, 1985); *Southern Pacific Transportation Co. v. Commercial Metals Co.*, 450 U.S. 336 (1982); *Kassel v. Consolidated Freightways Corp.*, 449 U.S. 897 (1980); *Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 885 (1977).

[3] *See, e.g., Western Airlines v. California*, 53 U.S.L.W. 3484 (U.S. Jan. 7, 1985) (Motion of Air Transport Association of America for leave to file brief amicus curiae granted); *Peick v. Pension Benefit Guaranty Corp.*, 465 U.S. 1098 (1984) (American Trucking Association).

[4] A listing of the membership of the Association appears at Appendix A to the attached brief.

FELA liability), voided a provision of a collective bargaining agreement that specifically provides for an offset from employee medical expense awards in a FELA action of medical benefits provided by railroad employers to their employees pursuant to an employer-funded industry medical insurance plan covering on-duty employee injuries. In voiding the collective bargaining agreement and allowing employees in a FELA action to recover twice for medical expenses previously paid by their employers, the decision below both improperly interferes with the collective bargaining process and unnecessarily and unjustifiably imposes substantial, duplicative medical expense costs on the railroad industry for on-duty employee injuries.

The consequences of this decision will be felt by the entire railroad industry, not just by the individual railroad involved in the litigation below. Because they represent the railroad industry as a whole, the AAR, NRLC and NARTC are in a position to convey the industry's concern with this decision and to present factual information which will underscore that concern. Thus, the AAR, NRLC and NARTC respectfully submit that their participation as *amici curiae* will assist the Court in resolving this case by providing a broad prospective on the decision below and its impact on the railroad industry.

Respectfully submitted,

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May 16, 1986

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF THE AMICI CURIAE	1
SUMMARY OF ARGUMENT	3
I. The Decision Below, that Section 5 of FELA Invalidates a Collective Bargaining Agreement Requiring a Set-off of Prior Payments of Medical Expenses under the Industry's Health and Welfare Plan, Seriously Misconstrues Section 5 and Reflects a Recurring Conflict in the Lower Courts That Should be Resolved by this Court	5
A. Background—The 1975 Collective Bargaining Agreement at Issue was Specifically Adopted to Redress the Double Recovery Problem Arising from Conflicting Court Decisions	5
B. The Longstanding Conflict in the Lower Courts Permitting Double Recovery of Medical Expenses Has Not Been Resolved by the 1975 Collective Bargaining Agreement and Can Only Be Definitively Resolved by this Court	13
C. The Decision Below Seriously Misconstrues Section 5	14
D. The Decision of the Court Below Conflicts with Important Policy Objectives Underlying FELA and the Collective Bargaining Process	18
CONCLUSION	20
Appendix A: Members of the Association of American Railroads	1a
Appendix B:	11a

TABLE OF AUTHORITIES

CASES Page

Banks v. Central of Georgia Railroad Co., Civ. No. 8308 (Muscogee Cty., Ga., Feb. 24, 1981) 13
Blake v. Delaware and Hudson Railway Co., 484 F.2d 204 (2d Cir. 1973) 9, 10, 11, 13, 17
Chicago & North Western Railway v. United Transportation Union, 402 U.S. 570 (1971) 20
Clark v. Burlington Northern, Inc., 726 F.2d 448 (8th Cir. 1984) 13, 18, 19
Diaz v. Indiana Harbor Belt Railroad Co., Civ. No. H79-13 (N.D. Ind. Dec. 1, 1985) 13
Folkestad v. Burlington Northern, Inc., No. CV-83-84-BLG (D. Mont., Sept. 30, 1985), *appeal pending*, Nos. 85-4280 and 4305 (9th Cir.) 13
Hall v. Minnesota Transfer Railway Co., 322 F. Supp. 92 (D. Minn. 1971) 2, 9, 10
Haughton v. Blackship, 462 F.2d 788 (5th Cir. 1972) 9
Herbst v. Burlington Northern Railroad Co., CV-84-51-BLG (D. Mont., April 22, 1985) 13
Lesinski v. Norfolk & Western Railway Co. and Conrail, No. H-9307 (Supreme Ct. N.Y., June 11, 1982) 13
Lopez v. Southern Pacific Transportation Co., 1 Civ. No. 40048 (Cal. App. 1977) 13
Lucht v. Chesapeake & Ohio Railway Co., 489 F. Supp. 189 (W.D. Mich. 1980) 10, 11
Morrison-Knudson Construction Co. v. Director, OWCP, 461 U.S. 624 (1983) 7
Nelson v. Penn Central Railroad Co., 415 F.Supp. 225 (N.D. Ohio 1976) 9, 10, 18
Patterson v. Norfolk & Western Railway Co., 489 F.2d 303 (6th Cir. 1973) 9, 10
Philadelphia, Baltimore & Washington Railroad v. Schubert, 224 U.S. 603 (1921) 15
Rogers v. Chicago & North Western Transportation Co., 59 Ill. App. 3d 911, 375 N.E. 2d 952 (Ill. App. 1978) 9
Royster Company v. United States, 432 F.Supp. 375 (E.D. Va. 1972) 7

TABLE OF AUTHORITIES—Continued

Page

Southern Pacific Transportation Co. v. Allen, 525 S.W. 2d 300 (Tex. Civ. App. 1975) 11
Thomas v. Humble Oil & Refining Co., 420 F.2d 793 (4th Cir. 1970) 13, 18
Thomas v. Penn Central Co., 379 F.Supp. 24 (W.D. Penn. 1974) 7, 9, 10, 18
UMWA Health & Retirement Funds v. Robinson, 455 U.S. 562 (1982) 20
Urbaniak v. Erie Lackawanna Railway Co., 424 F.Supp. 981 (W.D. N.Y. 1977) 9, 11, 18
Wagner v. Reading Co., 428 F.2d 289 (3rd Cir. 1970) 9

STATUTES

Boiler Inspection Act, 45 U.S.C. §§ 22 et seq. (1982) 14
Federal Employers' Liability Act, 45 U.S.C. §§ 51 et seq. (1982), 45 U.S.C. § 55 (1982) ..... *passim*

LEGISLATIVE MATERIALS

H.R. Rep. No. 1386, 60th Cong., 1st Sess. (1908) 15
40 Cong. Rec. 4607 (1906) 16
40 Cong. Rec. 7661 (1906) 16
40 Cong. Rec. 7662 (1906) 15, 16
40 Cong. Rec. 7696 (1906) 16
40 Cong. Rec. 7915-20 (1906) 6, 16
42 Cong. Rec. 4427 (1908) 16
42 Cong. Rec. 4527 (1908) 15

MISCELLANEOUS

E.R. Johnson, *Railway Departments for the Relief and Insurance of Employes*, 162 Annals of Amer. Acad. Pol. & Soc. Sci. 424, 429-432 (1895) 5
Fleming, *The Collateral Source Rule and Loss Allocation in Tort Law*, 54 Calif. L. Rev. 1478 (1966) 11
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TABLE OF AUTHORITIES—Continued

Page

Report of the Tort Policy Working Group on the Causes, Extent and Policy Implications of the Current Crisis in Insurance Availability and Affordability (U.S. Attny. Gen., February 1986) 11

Schwartz, *The Collateral Source Rule,* 41 B.U.L. Rev. 348 (1961) 11

Work Injuries in the Railroad Industry, 1938-40 (Rd. Retirement Bd. 1947) 6

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BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS, NATIONAL RAILWAY LABOR CONFERENCE, AND NATIONAL ASSOCIATION OF RAILROAD TRIAL COUNSEL AS *AMICI CURIAE* IN SUPPORT OF THE PETITION

INTEREST OF THE AMICI CURIAE [1]

The Association of American Railroads ("AAR") is the trade association for the nation's railroads. Almost all of the nation's Class I railroads are members of the National Railway Labor Conference and are represented by the Conference in national collective bargaining pursuant to the Railway Labor Act. The National Association of Railroad Trial Counsel ("NARTC") is a volun-

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[1] Petitioner has consented to the filing of this brief pursuant to Rule 36 of the Supreme Court rules. Respondent withheld consent. A motion for leave to file this brief therefore accompanies the brief.

tary, unincorporated nonprofit organization composed of over 1,200 trial lawyers who represent all of the significant railroads operating throughout the United States.

The decision below represents the most recent of a recurring series of conflicting state and federal court decisions construing the applicability of Section 5 of the Federal Employers' Liability Act ("FELA")[2] in the context of employer-provided medical benefits. In its decision below, the Montana Supreme Court has interpreted Section 5 of FELA to invalidate a collective bargaining agreement providing for a set-off against employee FELA recoveries of employer-paid medical expenses under a railroad industry Health and Welfare Plan administered by the Travelers' Insurance Company (GA-23000). The Montana Supreme Court held that Section 5 "broadens application of the collateral source rule"[3] in FELA cases involving a medical insurance plan to allow a set-off only of "the premiums, not what the premiums bought." The Court further held that Section 5 does not permit a railroad employer to "contract away" its FELA liability for payment of employee medical expenses even though those expenses have already been paid by the employer pursuant to the insurance plan.

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[2] 45 U.S.C. § 55 (1982). Section 5 prohibits "[a]ny contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability [under FELA]. . . ." A proviso to Section 5 states that, notwithstanding this general prohibition, a railroad may set off in any FELA suit "any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee . . . on account of the injury or death for which said action was brought."

[3] The collateral source rule provides that a tortfeasor cannot reduce the amount of his liability upon a judgment for an injured plaintiff by reason of compensation or insurance proceeds paid to the plaintiff from a collateral source independent of the tortfeasor. *Hall v. Minnesota Transfer Ry. Co.*, 322 F. Supp. 92, 94-95 (D. Minn. 1971).

The ruling of the Montana Supreme Court, which is neither warranted in law, equity, nor logic and which conflicts with decisions of other state and federal courts, has the effect of requiring railroad employers to pay twice for the medical treatment of employees who are injured on the job and of voiding an express agreement between rail management and labor to resolve in a mutually satisfactory manner a longstanding and recurring "double recovery" problem created by conflicting court decisions construing Section 5. As such, the decision below directly impedes the efforts of *amici curiae*, on behalf of the railroad industry, to prevent the imposition of costly, duplicative and unnecessary damage awards in FELA cases and to preserve the sanctity of collective bargaining agreements in defining and qualifying the scope of employee health and welfare benefits payable by railroad employers. The AAR, NRLC, and NARTC therefore strongly support the petition for a writ of certiorari.

SUMMARY OF ARGUMENT

The treatment under Section 5 of FELA of medical expense payments made by railroad industry employers to their employees for on-duty injuries pursuant to the industry's employer-funded Health and Welfare Plan has been a longstanding source of conflict in the lower courts. Although many courts have properly viewed the industry insurance plan as providing a source of funds through which the railroad employer may fully satisfy its FELA obligations for the payment of employee medical expenses, other courts have considered on-duty medical expenses paid pursuant to the insurance plan as an employee "fringe benefit" and have allowed an employee in a FELA action to "recover" such medical expenses a second time under the "collateral source" rule.

The 1975 collective bargaining agreement at issue in the instant case was intended by both rail management and labor to definitively resolve the longstanding "double

recovery" problem by making clear that medical expense payments under the industry plan for on-duty injuries are not intended as an employee fringe benefit and are provided with the qualification that such payments be offset from any subsequent award of medical expenses under FELA. Despite the clear language and intent of the collective bargaining agreement, however, the lower courts are still split on the employee's "right" to a double recovery under Section 5 of FELA. While most courts appear to enforce the offset provision of the collective bargaining agreement, other courts, such as in the decision below, have instead voided the offset provision as violative of Section 5. The longstanding, recurring conflict in the lower courts over the treatment of employee medical expenses under FELA requires intervention by this Court if the railroad industry is not to be subjected to costly and wholly unwarranted duplicative medical expense payments in FELA actions.

Moreover, the decision below and those of other courts voiding the collective bargaining offset provision seriously misconstrue Section 5 of FELA and conflict with important federal policy objectives. Contrary to the decision below, the industry medical expense plan is not an effort to "contract away" FELA liability, but is simply an effort by the industry to provide employee medical benefits *in addition* to those required by FELA for on-duty injuries (i.e., regardless of employer fault) while concomitantly ensuring that the railroad employer will be required to pay only *once* for medical expenses covered by FELA. As such, the general prohibition set forth in Section 5 against an employer "exempting" itself from FELA liability is not implicated by the industry's medical insurance plan, and the proviso to Section 5 relied upon by the court below to define the permissible employer set-off allowed by Section 5 is wholly irrelevant to this case. Indeed, voluntary employer-paid medical insurance plans such as GA-23000 serve, rather than impede, the objectives of FELA by ensuring the provision of medical

expense benefits to employees and should not be discouraged or jeopardized by making such plans twice as expensive to provide as would the decision of the court below.

Further, by voiding the collective bargaining offset provision and requiring duplicative payments of medical expenses contrary to the intentions of the parties, the court below has not only improperly construed the requirements of FELA, but has also violated the strong federal policy against judicial intrusion into the collective bargaining process. Because of the economic significance of this case to the railroad industry and the serious policy implications of the decision below, resolution of the longstanding controversy underlying the administration of Section 5 of FELA is required by this Court.

I. The Decision Below, That Section 5 of FELA Invalidates a Collective Bargaining Agreement Requiring a Set-Off of Prior Payments of Medical Expenses under the Industry's Health and Welfare Plan, Seriously Misconstrues Section 5 and Reflects a Recurring Conflict in the Lower Courts That Should Be Resolved By This Court

A. *Background—The 1975 Collective Bargaining Agreement at Issue Was Specifically Adopted to Redress the Double Recovery Problem Arising From Conflicting Court Decisions*

The railroad industry has traditionally paid for the medical care of employees who are injured on the job. Railroad "relief departments" were established as early as 1880 in order to assist injured employees with medical expenses and thereby serve the railroads' interest in the health and morale of their workforce.[4] As the Petition relates, one practice of the relief departments did

[4] *See* E.R. Johnson, *Railway Departments for the Relief and Insurance of Employes*, 162 Annals of Amer. Acad. Pol. & Soc. Sci. 424, 429-432 (1895).

draw Congress' disapproval in the enactment of FELA at the turn of the century: in response to the urging of the employees' organizations Congress invalidated in Section 5 the use of contracts whose purpose or intent was to exempt the railroad from liability, such as form contracts releasing the railroad from liability as a condition of receiving benefits from the relief departments. *See* Petition at 16. At the same time, however, the employees' organizations acknowledged that the railroads were providing financial assistance to injured employees and should receive due credit:

> From a moral standpoint, we think it only just and fair that the carrier should be given credit for such amounts as it has actually paid to an injured employee on account of such injury.

Letter from H.R. Fuller to Senator LaFollette (June 2, 1906), *reprinted in* 40 Cong. Rec. 7919-20 (1906). As a result of this statement, Congress included in Section 5 a proviso preserving the railroads' right to set-off from FELA awards the portion of benefits paid to injured employees to which the railroads had contributed. *See* Petition at 17 n. 28, 18-19.

In the early plans, both the employees and the railroads contributed to the cost of medical care. Between the enactment of Section 5 in 1906 and the 1950's, the practice with respect to medical care had evolved to the point that, at least with respect to on-duty injuries, the railroads alone generally were paying the full costs.[5] This trend carried over to the health and welfare plan established in the 1950's.

Thus, when the modern health and welfare plan was negotiated in the 1950's and 60's, the unions insisted that on-duty injury coverage for medical expenses not be paid out of the compensation allocated for each worker for

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[5] *See Work Injuries in the Railroad Industry, 1938-40,* 178 (Rd. Retirement Bd. 1947).

fringe benefits. *See, e.g., Thomas v. Penn Central Company*, 379 F. Supp. 24, 26-27 (W.D. Penn. 1974). The agreements reached between the railroads and their unions therefore expressly provided that, while many of the benefits of the plan were to be considered "fringe benefits" in lieu of wages, on-duty injury coverage was to be handled by the railroads separately and would not be charged against the funds available for employee compensation.[6]

The majority of the railroads presently arrange for the administration and payment of employee medical expenses for on-duty injuries through Group Policy No. GA-23000 ("GA-23000"), offered by the Travelers Insurance Company.[7] GA-23000, which has been in effect

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[6] *See* Agreement of August 19, 1960, Art. V § 1(d)(1) ("premium[s] for the insurance benefit payments resulting from on-duty injuries . . . are not considered as wage equivalents"); letter from G.E. Leighty to J.P. Tahney, *et. al.* (Sept. 16, 1960) ("the increased cost to all railroads, whether non-hospital or hospital association railroads, is 810.77 per month per employee, $9.96 of which is considered to be in lieu of a wage increase in early 1961 and 81¢ for on-duty injury coverage which is considered a carrier liability") (Appendix B at ~~14a~~ 16a); letter from National Railway Labor Conference to L.J. Wagner and C. Luna (March 26, 1964) ("The Carriers shall definitely assume the entire cost of the on-duty injuries cost factor after the expiration of the initial two-year Policy.") (Appendix B at ~~17a~~ 19a).

The cost of providing on-duty injury coverage is accordingly a general labor cost that is not part of an employees' compensation. *Cf. Morrison-Knudsen Construction Co. v. Director, OWCP*, 461 U.S. 624 (1983) (contributions to employee benefit trust funds not "wages" under Longshoremen's and Harbor Workers' Compensation Act); *Royster Company v. United States*, 342 F.Supp. 375 (E.D. Va. 1972) (reimbursement of expenses incurred by employees in connection with business travel is not compensation).

[7] While a majority of railroad employees are covered by GA-23000 a number of major railroads still utilize employee hospital associations for treating, or reimbursing the medical expenses associated with, on-duty injuries. These railroads reimburse the hospital associations under various arrangements. Other railroads make

since 1955, is financed by employer contributions into a trust fund of amounts determined to be sufficient to pay the anticipated cost of employee medical expenses for on-duty injuries plus additional amounts for claims administration and the purchase of insurance to cover claims in excess of that satisfied by the trust fund.[8] When an employee incurs an on-duty injury, the railroad either pays the resulting medical bills in full and seeks reimbursement from Travelers under GA-23000 or forwards the bills to Travelers for payment. Any medical expenses not covered by GA-23000 are paid directly by the railroad employer.

Notwithstanding that employee medical expenses for on-duty injuries are wholly paid for by the employer under the GA-23000 plan and that the employee in fact incurs no medical expenses that must be reimbursed in a FELA action, employees have often sought to recover as an element of damages in a FELA case the cost of medical treatment rendered in conjunction with an on-duty injury. The issue of whether the employee is entitled to "recover" for such medical expenses has been resolved in conflicting fashion by various state and federal courts with the outcome generally dependent on conflicting application of the collateral source rule to benefits paid under GA-23000 and conflicting interpretations of the requirements of Section 5 of FELA.

Courts which have permitted FELA plaintiffs to plead medical expenses as an element of damages (while pro-

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direct payments of medical expenses to employees or use an insurance program other than GA-23000. It is a universal practice, however, for the railroads to pay medical expenses for on-duty injuries.

[8] GA-23000 also provides medical benefits to employees for off-duty injuries as well as certain life insurance and accidental death and dismemberment benefits. The premiums for these employee benefits are paid separately from those for on-duty medical expenses and are subject to a separate experience rating.

hibiting a showing that such expenses were paid by the railroad) have concluded that the GA-23000 policy is a fringe benefit provided by the employer in partial consideration for services rendered by the employee. As such the medical benefits paid on the employee's behalf pursuant to the GA-23000 policy have been considered a collateral source and not allowed as an offset to employee FELA recoveries.[9] Often in these cases provisions of applicable collective bargaining agreements were either not before the court, or were deemed insufficient to rebut the view that payment of medical expenses under the policy constituted a fringe benefit.[10]

Other courts have found that the GA-23000 policy is not a collateral source and have prohibited a double recovery. In so holding these courts have noted that in addition to being funded entirely by the railroad employer, the GA-23000 policy serves the important purpose of providing the railroad employer with funds with which to pay its FELA liability pertaining to employee medical expenses.[11] As generally noted by the courts, policies of indemnity do not fall within the collateral source rule.[12]

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[9] See, e.g., *Patterson v. Norfolk & Western Ry. Co.*, 489 F.2d 303, 308 (6th Cir. 1973); *Blake v. Delaware and Hudson Ry. Co.*, 484 F.2d 204 (2d Cir. 1973); *Urbaniak v. Erie Lackawanna Ry. Co.*, 424 F.Supp. 981 (W.D. N.Y. 1977); *Hall* v. *Minnesota Transfer Railway Company*, 322 F.Supp. 92, 96 (D. Minn. 1971). *See also, Haughton v. Blackship*, 462 F.2d 788 (5th Cir. 1972) (application of collateral source rule to retirement benefits in Jones Act action).

[10] See, e.g., *Patterson v. Norfolk & Western Ry. Co., supra*; *Blake v. Delaware and Hudson Ry. Co., supra*; *Urbaniak v. Erie Lackawanna Ry. Co., supra.*

[11] *Nelson v. Penn Central R. Co.*, 415 F.Supp. 225, 227 (N.D. Ohio 1976); *Thomas v. Penn Central Company*, 379 F. Supp. 24, 27 (W.D. Penn. 1974); *cf. Wagner v. Reading Company*, 428 F.2d 289 (3rd Cir. 1970); *Rogers v. Chicago & North Western Transportation Co.*, 59 Ill. App. 3d 911, 375 N.E. 2d 952, 957-958 (Ill. App. 1978).

[12] *Nelson v. Penn Central R. Co.*, 415 F.Supp. at 227; *Thomas v. Penn Central Company*, 379 F.Supp. at 27-28; see also *Haughton v. Blackships, Inc.*, 462 F.2d 788, 791 (5th Cir. 1972).

In addition, in several of these cases the court had before it, and gave full effect to, a provision of an applicable collective bargaining agreement describing premiums paid by the railroad employer for the GA-23000 policy as "not considered as wage equivalents." [13]

Courts considering the status of medical payments made pursuant to GA-23000 have conflicted not only with respect to whether such payments constituted fringe benefits within the scope of the common law collateral source rule, but also with respect to the requirements of the proviso to Section 5 of FELA pertaining to permissible set-offs. Thus the courts, in inconsistent fashion, have characterized Section 5 as simply incorporating the common law collateral source rule; [14] as modifying the common law rule to allow set-off of enumerated employer payments set forth in the proviso "regardless of [their] status under the common law",[15] and as codifying the common law rule "in a FELA setting, the effect of which is to further broaden what is determined to be a "collateral source.' " [16] The latter viewpoint is epitomized in the concurring opinion of Circuit Judge Friendly in *Blake v. Delaware and Hudson Railway Company* (an opinion followed by other courts) :

> What constrains me to concur [that payments made under GA-23000 constitute a collateral source] is that

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[13] See, e.g., *Nelson v. Penn Central R. Co., supra*; *Thomas v. Penn Central Company, supra* (Article V of August 19, 1960 collective bargaining agreement applicable to non-operating employees).

[14] *Cf. Nelson v. Penn Central R. Co.*, 415 F.Supp. at 226; *Thomas v. Penn Central Company*, 379 F.Supp. at 25; *Patterson v. Norfolk and Western Railway Company*, 489 F.2d at 307-308.

[15] *Hall v. Minnesota Transfer Railway Company*, 322 F.Supp. at 95.

[16] *Lucht v. Chesapeake & Ohio Ry. Co.*, 489 F.Supp. 189, 190 (W.D. Mich. 1980) (construing *Blake v. Delaware and Hudson Railway Company*, 484 F.2d at 207 (concurring opinion of Friendly, J.))

> here we are governed not by federal common law but by statute. Under 45 U.S.C. § 55 the railroad is entitled to set off only the premiums, not what the premiums bought. . . . If the railroads wish to avoid the harsh result [of employee double recovery of medical expenses] they can accomplish this by specific provision in the collective bargaining agreement.

484 F.2d at 207; *see also*, e.g., *Urbaniak v. Erie Lackawanna Ry. Co.*, 424 F. Supp. at 981 (W.D.N.Y. 1977); *Lucht v. Chesapeake & Ohio Ry. Co.*, 489 F. Supp. at 190; *Southern Pacific Transportation Co. v. Allen*, 525 S.W. 2d 300, 307 (Tex. Civ. App. 1975).[17]

Because of the inconsistent treatment by the courts of GA-23000 with regard to whether it is a "collateral source" for FELA purposes, and as a result of Judge Friendly's suggestion in *Blake* for resolving the controversy, the railroads entered into a Health and Welfare

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[17] The wisdom of the collateral source rule has itself been questioned. Forcing a defendant to pay full damages even though part of those alleged expenses have been paid by another source clearly creates a windfall for plaintiffs. For this reason and others, many commentators have advocated abolition of the collateral source rule. *See e.g.*, McDowell, *The Collateral Source Rule—The American Medical Association and Tort Reform*, 24 Washburn L.J. 205 (1985); Fleming, *The Collateral Source Rule and Loss Allocation in Tort Law*, 54 Calif. L. Rev. 1478 (1966); Schwartz, *The Collateral-Source Rule*, 41 B.U.L. Rev. 348 (1961).

Most recently, a report prepared by the Justice Department in cooperation with other federal agencies concluded that the collateral source rule cannot be justified on policy grounds and that its elimination would contribute significantly to easing the liability insurance crisis being felt in many sectors of the economy. *See* Report of the Tort Policy Working Group on the causes, Extent and Policy Implications of the Current Crisis in Insurance Availability and Affordability, 70-72 (February 1986). Inasmuch as the measure of damages in FELA cases is a matter of federal law, and the collateral source rule is judicially created doctrine, this case provides an opportunity to consider the value and scope of that rule in tort cases governed by federal law.

Agreement with the major railroad employee unions in October 1975. App. at 25a. Article III of the agreement specifically provided, with the stated intent of avoiding duplicative payments of medical expenses to employees, that "[b]enefits provided under the policy contract [GA-23000] will be offset against the right of recovery the employee may have against the employing railroad for hospital, surgical, medical or related expenses of any kind specified in the policy contract." The parties also confirmed the intended operation of their agreement in several letters, one of which, a March 12, 1975 letter from Mr. William H. Dempsey of the NRLC to Mr. John Peterpaul of the International Association of Machinists, was introduced in the record below.[18] That letter contained the following example of the set-off provision:

> An employee is injured on duty. He sues the employer for $10,000 and includes in his claim $1,000 of medical expenses which have already been paid under GA-23,000. If he wins the suit, he should collect $9,000, not $10,000, for otherwise he would be collecting twice for the same thing.

This letter also makes clear that the railroads identified this set-off, among other provisions, as a condition of continuing the benefits provided under GA-23,000 and that without such an assurance the on-duty injury coverage might well have been discontinued.

The 1975 Health and Welfare Agreement accordingly merely made explicit what had been assumed for decades —that the on-duty injury coverage was to be provided wholly at the railroads' expense and was not part of employee compensation. Just as in 1906, the unions acknowledged in the 1975 Agreement that the railroads were entitled to credit for benefits provided at their expense.

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[18] *See* Defendant's Brief in Opposition to Plaintiff's Motion in Limine at 9 (Exhibit attached at Appendix B at 20a-~~21a~~).

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B. *The Longstanding Conflict in the Lower Courts Permitting Double Recovery of Medical Expenses Has Not Been Resolved By the 1975 Collective Bargaining Agreement And Can Only Be Definitively Resolved By This Court*

Despite the 1975 collective bargaining agreement making crystal clear that medical expenses paid by railroad employers pursuant to GA-23000 are not intended to be duplicative of FELA awards and must be offset from any subsequent employee right of recovery under FELA for medical expenses, the lower courts are still split on the employee's "right" to a double recovery under Section 5 of FELA. While most courts that have considered the issue appear to enforce the collective bargaining agreement pursuant to its terms,[19] other courts, as in the instant case, have instead voided the collective bargaining agreement.[20] The rationale of such cases rests in the popularized dictum of the *Blake* case (incorporated as holdings in various decisions) that Section 5 "broadens application of the collateral source rule" in FELA cases to allow set-off only of "the premiums, not what the premiums bought." App. at 11a-12a. In the view of these courts, because the 1975 collective bargaining agreement seeks to "contract away" benefits otherwise payable to an employee under FELA (i.e., employee medical expenses

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[19] See, e.g., *Diaz v. Indiana Harbor Belt RR Co.*, Civ. No. H 79-13 (N.D. Ind., Dec. 1, 1985) (Pet.'s App. at 41a-45a); *Lesinski v. Norfolk & Western Ry. Co. and Conrail*, No. H-9307 (Supreme Ct., N.Y.; June 11, 1982); *Banks v. Central of Georgia RR Co.*, Civ. No. 8308 (Muscogee Cty. Ct., Ga., Feb. 24, 1981); *Cf. Clark v. Burlington Northern Inc.*, 726 F.2d 448, 451 (8th Cir. 1984); *Thomas v. Humble Oil & Refining Co.*, 420 F.2d 793, 794-95 (4th Cir. 1970).

[20] See, e.g., *Folkestad v. Burlington Northern, Inc.*, No. CV-83-84-BLG (D. Mont., Sept. 30, 1985), *appeal pending*, Nos. 85-4280 & 4305 (9th Cir.); *Herbst v. Burlington Northern RR Co.*, CV-84-51-BLG (D. Mont., April 22, 1985) (Pet.'s App. at 32a-33a); *Lopez v. Southern Pacific Transp. Co.*, 1 Civ. No. 40048 (Cal. App. 1977) (Pet.'s App. at 34a-40a).

paid though "collateral sources") the agreement is violative of the general prohibition of Section 5 and is thus void to the extent it requires a set-off. App. at 11a-12a.

The railroads thus continue to face the same dilemma they faced prior to the 1975 agreement: Having obligated themselves to pay in full the medical bills of employees who are injured on the job, they have no assurance that they will not be required to pay those same expenses twice. Because the lower courts have been wholly unable to resolve the FELA medical benefits issue in consistent fashion in the absence of guidance from this Court, and because the instant case and other decisions voiding the 1975 collective bargaining agreement seriously misconstrue the requirements of Section 5 and otherwise disregard important public policy considerations, review of the decision below is imperative.

C. *The Decision Below Seriously Misconstrues Section 5*

The decision of the court below, and similar decisions voiding the 1975 collective bargaining agreement, rest on a wholly erroneous construction of Section 5 of FELA and do serious damage to the legislative intent underlying Section 5. Indeed, the GA-23000 plan and the collective bargaining agreement at issue in the instant case serve to *implement* rather than impede the purpose for which FELA was enacted.

Pursuant to the requirements of FELA, 45 U.S.C. §§ 51 *et seq.* (1982), railroad employers are liable in damages for on-duty injuries sustained by their employees which are either caused by negligence of the employer or result from breach of obligations imposed on the employer by other federal statutes.[21] To ensure the rights of railroad employees under FELA against employer attempts to limit liability, Section 5 of FELA prohibits a

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[21] See, e.g., 45 U.S.C. §§ 22 et seq. (1982) (Boiler Inspection Act of 1911).

railroad employer from exempting itself by contract or other device from liability created by FELA:

> Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: *Provided,* That in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought.

As the legislative history of Section 5 makes clear, Congress' intent in prohibiting railroad efforts by contract or other device to exempt themselves from FELA liability was directed against such turn-of-the-century railroad practices as requiring employees to sign releases from personal injury claims as a condition of employment, requiring employees to join and contribute to employer-supported "relief associations" as an exclusive means of obtaining redress for on-duty injuries, as well as similar devices through which the railroads sought to exempt themselves from liability for personal injury claims of employees.[22] As the legislative history of Section 5 further establishes, the language of the proviso was specifically incorporated in Section 5 as a *protection to employers* to make clear that even if a contract or device violated the general prohibition, the railroad would still be entitled to recover, as a set-off from a FELA recovery, sums it had actually contributed to the employee on account of his injury through such prohibited contract or device.[23]

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[22] See H.R. Rep. No. 1386, 60th Cong., 1st Sess. 6-9 (1908); see also *Phila., Balt. & Wash. R.R. v. Schubert,* 224 U.S. 603 (1912).

[23] See 40 Cong. Rec. 7662 (1906) (remarks of Mr. Gallinger); 42 Cong. Rec. 4527 (1908) (remarks of Mr. Dolliver); 40 Cong.

Considered in the light of the language, legislative history and purpose of Section 5, the decision of the court below is totally without foundation. First, far from constituting a device "the purpose or intent" of which is to exempt the railroad employer from FELA liability for employee injuries, the GA-23000 plan, which is fully funded by the railroad employer, is expressly intended to *provide* funds to employees who are injured on the job for the payment in full of their medical expenses. Indeed, medical benefits provided by the GA-23000 plan go *beyond* employer obligations under FELA. Railroads are not obligated by FELA to pay employee medical expenses in advance of a FELA judgment, nor are they required by FELA to pay employee medical expenses for on-duty injuries in situations where no liability under FELA is imposed. The GA-23000 plan affords railroad employees both these additional benefits while concomitantly providing railroad employers with funds to meet their potential FELA obligations for the payment of medical expenses.

Nor does Section 5 of FELA require that railroad employers pay twice for employee medical expenses for injuries covered by FELA. The 1975 collective bargaining agreement, by expressly qualifying the medical benefits payable to employees under GA-23000 to specifically require an offset in a FELA action of medical expenses previously paid by the policy, merely seeks to provide a means of ensuring the elimination of duplicative payments resulting from court decisions construing medical benefits paid pursuant to GA-23000 as a fringe benefit to which the employee is unqualifiedly entitled. As the 1975 collective bargaining agreement makes crystal clear, duplicative payments of employee medical expenses is

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Rec. 7662 (1906) (remarks of Mr. Foraker); 42 Cong. Rec. 4427 (1908) (remarks of Mr. Sterling); 40 Cong. Rec. 4607 (1906) (remarks of Mr. Henry). See also Senate debate regarding proposal to delete the proviso, 40 Cong. Rec. 7661-62, 7696, 7915-20 (1906).

not intended by either railroad management or labor to be part of the employee's compensation package under the GA-23000 plan. Because the 1975 collective bargaining agreement merely defines the extent of the employer's obligation for the payment of medical expenses under GA-23000 and does not purport to exempt the railroad from liability for the payment of medical expenses under FELA, the Montana Supreme Court's decision voiding the collective bargaining agreement as violative of Section 5 is utterly without foundation in law or logic.

Second, the Court's construction of the proviso to Section 5, premised on the *Blake* dictum as engrafted onto the general caselaw, merely compounds the confusion in existing law regarding the construction of Section 5. As the language, legislative history and purpose of Section 5 clearly demonstrate, the proviso to Section 5 does not become relevant unless a particular contract or device is first found to be violative of Section 5. In that event, the proviso works to the benefit of the employer by allowing a set-off of payments made by the employer on the employee's behalf notwithstanding that the contract or device is voided to the extent that it seeks to exempt the employer from liability. The proviso is thus wholly irrelevant with respect to employer medical plans, such as the GA-23000 plan at issue, which construed on their own merits do not fall within the general prohibition of Section 5.

Contrary to the decision in the instant case and those of other courts voiding the collective bargaining agreement, the language of the proviso was never intended to "broaden application of the collateral source rule" to *define* in the first instance as a "collateral source" all plans for the payment of medical expenses administered by insurance companies, such as the GA-23000 plan. What constitutes a "collateral source" in the area of employee fringe benefits is first and foremost determined

by any applicable collective bargaining agreement, not by the proviso to Section 5.[24]

D. *The Decision of the Court Below Conflicts With Important Policy Objectives Underlying FELA and the Collective Bargaining Process*

The decision of the court below voiding the offset provision of the 1975 collective bargaining agreement has serious policy implications regarding the application of FELA and the proper functioning of the collective bargaining process. Moreover, the instant controversy is of great economic significance to the railroad industry. Each of these factors requires resolution of the long-standing controversy underlying the administration of Section 5 of FELA by this Court.

The railroad industry makes a large annual investment for the specific purpose of paying the medical bills of employees who are injured on the job. In each of the last three years the railroad industry as a whole has contributed over $40 million to fund on-duty medical expense benefits.[25] The needs of employees are well

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[24] See, e.g., *Urbaniak v. Erie Lackawanna Ry., supra*; *Nelson v. Central R.R. Co., supra*; *Thomas v. Penn Central Co., supra*; see also *Clark v. Burlington Northern, Inc.*, 726 F.2d at 451; *Thomas v. Humble Oil & Refining Co.*, 420 F.2d at 794-95.

Moreover, even if the proviso to Section 5 were deemed relevant to this case, the proviso allows a set-off of "any sum [a carrier] has contributed or paid to any insurance . . . that may have been paid to the injured employee. . . ." Since virtually all monies paid under GA-23000 to an employee are sums which have been paid by the carriers to the insurance company, or directly to the employee, the entire benefit received under the GA-23000 plan must be set-off under the proviso. The comment of the concurring opinion in the *Blake* case that only "premium" payments may be set-off is unduly restrictive and unsupported by the language of the proviso itself. The statute refers to "any sum" paid or contributed to any insurance relief benefit or indemnity. The payments are described generically, not in terms of "premiums" to an insurance company.

[25] In 1983 this amount was $40,639,703; in 1984, $45,331,839 and in 1985, $40,437,492. In addition the railroads also pay any balance not covered by the GA-23000 Policy.

served by this arrangement. It provides for prompt payment of medical bills for on-duty injuries thus alleviating the financial strain which the employee would otherwise have to bear until his FELA claim is either settled or litigated to judgment—a process which can take months or even years.[26]

The decision of the court below voiding the set-off provision of the 1975 collective bargaining agreement and permitting duplicative recoveries of medical expenses by employees can only serve to jeopardize the continued provision of these medical expense benefits by making such programs twice as costly to provide. In addition, disallowance of the collective bargaining agreement set-off not only needlessly imposes an additional and heavy economic burden on the railroad industry, but concomitantly makes it more difficult for the railroad industry to adequately fund its existing FELA medical expense obligations if it cannot be assured of using insurance programs such as GA-23000 as a funding vehicle without incurring duplicative obligations. Any reading of Section 5 of FELA which both provides a disincentive to employers to provide voluntary medical expense plans in excess of FELA requirements and at the same time lessens the ability of employers to meet their FELA obligations can only serve interests contrary to that which Section 5 was intended to promote. As succinctly stated by one court, "[t]he employer's manifest intent to avoid double liability in offering disability plans [though specific provision for offset of such benefits from FELA awards] must be respected if the collateral source rule is not to swallow up 45 U.S.C. § 55 at the ultimate expense of employees." *Clark v. Burlington Northern, Inc.*, 726 at 451.

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[26] Because railroad employees (and other employees covered by FELA) are governed by tort law as opposed to workers' compensation for on-duty injuries, their employers are not legally obligated to furnish medical care in the absence of an adjudication of liability.

In addition, the court below, by voiding the set-off provided in the 1975 collective bargaining agreement and requiring duplicative payments of medical expenses in FELA suits contrary to the intention of the parties, has improperly intruded itself into the collective bargaining process contrary to federal labor policy. As this Court has specifically noted, there is "strong federal labor policy against governmental interference with the substantive terms of collective-bargaining agreements." *Chicago & N.W. R.Co. v. United Transportation Union*, 402 U.S. 570, 579, n. 11 (1971); see also *UMWA Health and Retirement Funds v. Robinson*, 455 U.S. 562, 576 (1982) ("[w]hen neither the collective bargaining process nor its end product violates any command of Congress, a federal court has no authority to modify the substantive terms of a collective bargaining contract"). The decision below, and those of other courts voiding the collective bargaining provision based on their misconstruction of Section 5 of FELA, directly contravene this strong federal policy.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for certiorari.

Respectfully submitted,

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APPENDICES

APPENDICES

APPENDIX A

MEMBERS OF THE ASSOCIATION OF AMERICAN RAILROADS

Full Membership

Alton & Southern Railway

Atchison & Topeka & Santa Fe Ry. Co.
- Central California Traction
- Sunset Railway Company
- Alameda Belt Line RR Co.
- Harbor Belt Line RR Co.
- Kansas City Terminal Railway
- Oakland Terminal Railway
- Texas City Terminal Railway
- Wichita Union Terminal Ry. Co.
- Denver Union Terminal Rwy. Co.

Baltimore & Ohio Railroad Co.
- Akron & Barbeton Belt Railroad
- Curtis Bay Railroad
- Monongahela Railway Co.
- Terminal RR Assn. Of St. Louis

Baltimore & Ohio Chicago Terminal

Bangor & Aroostook Railroad Co.
- Van Buren Bridge

Bessemer & Lake Erie Railroad Company

Birmingham Southern RR Co.

The Lake Terminal RR Co.

McKeesport Connecting Rwy. Co.

The Newburgh & South Shore Rwy. Co.

Burlington Northern Railroad Co.
- Davenport Rock Island & NW
- Iowa Transfer Railway
- Kansas City Terminal

Minnesota Transfer Rwy.
Lake Superior Terminal & Transfer Railway of Wisconsin
Terminal RR Assn. of St. Louis
Portland Terminal RR
Paducah & Illinois
Winona Bridge
Camas Prairie
Burlington Northern Dock Corp.
Burlington Northern (Manitoba LTD)
Denver Union Terminal
Galveston Terminal Rwy.
Longview Switching Co.
Wichita Union Terminal Wy. Co.

Cambria & Indiana RR Co.

Canadian National—Line in U.S.:
Lines in New England
Lines in New York
Lines in Michigan
Lines in Vermont
Minnesota & Manitoba RR

Chesapeake & Ohio Railway Co.
Covington & Cin. Elev. RR & Transfer Bridge Co.
Norfolk & Portsmouth Belt Line RR
Toledo Terminal Railroad
Chicago South Shore & South Bend
Nicholas Fayette & Greenbriar

Canadian Pacific—Line In U.S.:
Lines in Maine
Lines in Vermont
Saulte St. Marie Bridge Co.

Chicago Illinois Midland Rwy. Co.

Chicago & North Western Trans. Co.
Lake Superior Term. & Trans. Rwy. Company of Wisc.

Minnesota Transfer Rwy. Co.
Kansas City Terminal Rwy.
Iowa Transfer Railway
Western Rail Properties

Chicago, Milwaukee, St. Paul & Pac. RR
Davenport Rock Island & NW
Indiana Harbor Belt RR
Kansas City Terminal Rwy.

Consolidated Rail Corp.
Monongahela Rwy. Co.
Pittsburgh, Chartiers & Youghiogheny Rwy.
Akron & Berbeton Belt RR
Calument Western Rwy.
Albany Port Authority
Indiana Harbor Belt RR Co.
Nicholas Fayette & Greenbrier

Denver & Rio Grande Western RR
Denver Union Terminal Rwy. Co.

Detroit & Mackinac Railway Co.

Duluth, Missabe & Iron Range Rwy. Co.

Elgin, Joliet & Eastern Railway

Galveston, Houston & Henderson RR

Grand Trunk Western RR
Grand Trunk Western RR
Central Vermont Railway Co.
Duluth, Winnipeg & Pacific Rwy.

Green Bay & Western RR Co.
Winona Bridge RR
Ahnapee & Western Rwy. Co.

Houston Belt & Terminal Rwy. Co.

Illinois Central Gulf RR
Kansas City Terminal Rwy.
Terminal RR Assn Of St. Louis
Paducah & Illinois

Kansas City Southern Railway
- Arkansas & Western Rwy.
- Kansas & Missouri Rwy. & Term. Co.
- Kansas City Terminal Rwy.
- Fort Smith & Van Buren Rwy. Co.

Lake Superior & Ishpeming RR

Louisiana & Arkansas Railway Co.

McCloud River Railroad Company

Manufacturers Railway Company

Missouri-Kansas-Texas RR Co.
- Kansas City Terminal Rwy.
- Texas City Terminal Rwy.
- Terminal RR Assn of St. Louis

Missouri Pacific Railroad Company
- Doniphan, Kensett & Searchy
- Arkansas & Memphis Rwy. Br. & Term.
- Brownsville & Matamoros Br. Term.
- Kansas City Terminal Rwy.
- Southern Illinois & Missouri Br. Co.
- Texas City Terminal Rwy.
- Terminal RR Assn of St. Louis
- Great Southwest RR Co.
- Chicago Heights Term. Trans
- Weatherford, Mineral Wells & Northwestern Rwy.

National Railroad Passenger Corporation

Norfolk & Western Railway Co.
- Chesapeake Western Ry
- Des Moines Union Ry Co.
- Fort Wayne Union Ry Co.
- Kansas City Terminal Ry
- Norfolk & Portsmouth Belt Line
- Akron & Borherton Belt
- Fairport, Painesville & Eastern
- Terminal RR Assn of St. Louis

Pittsburgh & Lake Erie RR Co.
- Monongahela Railway Co.
- Pittsburgh, Chartiers & Youghiogheny
- Lake Erie & Eastern RR
- Youngstown & Southern Ry Co.

Peoria & Pekin Union Railway

Pittsburgh & Shawmut RR Co.

Prescott & Northwestern RR Co.

Richmond, Frederickburgh & Potomac RR Co.

St. Louis-Southwestern Ry Lines
- Arkansas & Memphis Ry Br. Term
- Southern Illinois & Mo. Br. Co.
- Terminal RR Assn of St. Louis
- Kansas City Terminal Ry. Co.

Seaboard System Railroad Inc.
- Norfolk & Portsmouth Belt Line
- Gainesville Midland RR Co.
- Paducah & Illinois
- Terminal RR Assoc. of St. Louis
- Woodstock & Brockton RR
- Carrollton RR Co.

Soo Line Railroad Company
- Lake Superior Term. & Trans Ry Co. of Wisc.
- Minnesota Transfer Ry Co.
- Saulte Ste Marie Bridge Co.

Southern Pacific Transportation
- Holton Interurban Ry Co.
- Northwestern Pacific Railroad
- Petaluma & Santa Rosa RR
- Visalia Electric RR Co.
- Central California Traction Co.
- Portland Traction Company
- Sunset Railway Co.
- Harbor Belt Line RR Co.
- Portland Terminal Railroad

Southern Railway Company
- Alabama Great Southern RR Co.
- Woodstock & Blockton RR Co.
- Louisiana Southern Railway
- New Orleans Terminal Co.
- Atlanta & East Carolina Ry
- Camp LeJeune RR Co.
- Cincinnati, New Orleans & Texas Pacific
- Central of Georgia RR Co.
- Georgia Northern Ry Co.
- Georgia Southern & Florida Ry
- Live Oak Perry and South Georgia RR Co.
- State University RR Co.
- Interstate RR Co.
- Norfolk & Portsmouth Belt Line
- St. Johns River Terminal
- Tennessee, Alabama & Georgia Ry
- Tennessee Railway Co.
- Carolina & Northwestern RR Co.
- Algers, Winslow & Western
- Terminal RR Assn. of St. Louis

Texas Mexican Railway Company

Union Pacific Railroad Company
- Spokane International RR Co.
- Portland—Traction Company
- Harbor Belt Line
- Kansas City Terminal Ry Co.
- Portland Terminal RR
- Mt. Hood Railway Company
- Camas Prairie
- Denver Union Terminal
- Longview Switching Co.

Union RR Company of Pittsburgh

Vermont Railway Inc.

Western Pacific Railroad Co.
- Sacramento Northern RR
- Tidewater Southern Ry

Central California Traction Co.
Alameda Belt Line
Oakland Terminal Ry

Western Railway of Alabama
Atlanta & West Point

Winston-Salem Southbound
High Point, Thomasville & Denton

Chicago & Western Indiana

SPECIAL CANADIAN AND MEXICAN MEMBERS

Canadian Lines (in Canada)
Algoma Central Railway
British Columbia Hydro & Power Authority
British Columbia Railway
Canadian National Railways
Canadian Pacific Limited
Ontario Northland Railway
Toronto, Hamilton & Buffalo Railway
White Pass & Yukon Corporation Ltd.
VIA Rail Canada

Mexican Lines (in Mexico)

Chihuahua Pacific Railway Company
[Direccion General; de Ferrocarriles en Operacion]:

Ferrocarril Sonara-Baja California, S.A. de C.V.
Ferrocarriles Unidos del Sureste, S.A. de C.V.

Ferrocarril del Pacifico, S.A. de C.V.
National Railways of Mexico

Associate Members

Alaska Railroad (ALASKA)
American Refrigerator Transit Company
Amko Service Company
Apalachicola Northern Railroad Company
Atlanta & St. Andrews Bay Railway Company

Belfast & Moosehead Lake Railroad Company
Boston & Maine Corporation

California Western Railroad
Centromen Puru Incorporated
Chevron Chemical Company
Chicago South Shore & South Bend Railroad
Chicago Rail Link
Cities Services Company Railroad
Cliffs Western Australian Mining Company Pty. LTD. (AUSTRALIA)
Colorado & Wyoming Railway Company

Dardanelle & Russellville Railroad Company
Delray Connecting Railroad Company
Devco Railway (Cape Breton Dev. Corp.—Coal Div.) (CANADA)

East Erie Commercial Railroad
East Jersey Railroad and Terminal Company
East St. Louis Junction Railroad Company
Empressa Minera Del Centro Del Peru Railways (PERU, S.A.)
Essex Terminal Railway (CANADA)

Fepasa-Ferrovia Paulista (BRAZIL, S.A.)
Fruit Growers Express Company

Genesee & Wyoming Railroad Company
Grafton & Upton Railroad Company
Graysonia, Nashville & Ashdown Railroad Company
Great Western Railway Company

Hamersely Iron Pty. Ltd. (WESTERN AUSTRALIA)
Hartford & Slocomb Railroad Company
Hillsdale County Railway Company, Inc.

India, Gov't of: Ministry of Railways (INDIA)

Japanese National Railways (JAPAN)

Korean National Railroad (KOREA)

Lenawee County Railroad Company, Inc.
Louisiana & North West Railroad Company

Manufacturer's Junction Railway Company
Maryland & Pennsylvania Railroad Company
Metro North Commuter Railroad Company
Michigan Northern Railway Company, Inc.
Middletown & Hummelstown Railroad Company
MidSouth Rail Corporation
Minnesota, Dakota & Western Railway Company
Monongahela Connecting Railroad Corporation

New Orleans Public Belt Railroad
Northeast Illinois Railroad Corporation

Pacific Fruit Express Company
Pearl River Valley Railroad Company
Pickens Railroad—National Railway Utilization Corporation
Port Authority of New York & New Jersey (The)
Providence & Worcester Company
Public Transport Commission of New South Wales (AUSTRALIA)

Rede FERROVIARIA Federal S.A. (BRAZIL)
Roberval & Saguenay Railway Company (CANADA)
Roscoe, Synder & Pacific Railway Company

San Diego & Arizona Eastern Transportation Company
Sierra Railroad Company (CALIFORNIA)
Somerset Railroad Corporation
South African Railways (REPUBLIC OF SOUTH AFRICA)

Southern Indiana Railway, Inc.
Spanish National Railway, (RNFE) (SPAIN)

Taiwan Railway Administration (REPUBLIC OF CHINA)
Texas & Northern Railway Company

Upper Merion & Plymouth Railroad Company

Victoria A Minas Railway (BRAZIL)

Wabush Lake Railway Ltd. (CANADA)
Washington Railroad Company

Yancey Railroad Company

APPENDIX B

THE ORDER OF RAILROAD TELEGRAPHERS
3860 Lindell Boulevard
St. Louis, Mo.

September 16, 1960

Mr. J. P. Tahney, President
The American Railway Supervisors Assn., Inc.
53 West Jackson Blvd.
Chicago 4, Illinois

Mr. R. C. Coutts, President
American Train Dispatchers' Assn.
19 East Huron Street
Chicago 11, Illinois

Mr. A. Philip Randolph, President
Brotherhood of Sleeping Car Porters
217 W. 125th Street (Room 301)
New York 27, New York

Mr. Eugene E. Frazier, President
United Transport Service Employes
444 East 63rd Street
Chicago 17, Illinois

GROUP POLICY CONTRACT GA-23000
AS AMENDED AND EXPANDED

Dear Sirs and Brothers:

Your organization has a number of employes covered by Travelers Group Policy Contract GA-23000, as amended and expanded.

At the present time under that Group Policy Contract the carriers on non-hospital association railroads are pay-

ing $11.05 per month per employe for employe and dependent coverage while the premium cost for such coverage is $13.17 per month per employe, the difference being paid from our Special Account which has been built up over the years primarily through retroactive premium credits. On the hospital association railroads the carriers are paying not to exceed $6.80 per month per employe to the Hospital Association on that carrier for employe coverage; they also pay $4.25 per month per employe for dependent coverage while the premium on that coverage is $6.10 per month per employe, the balance being paid from our Special Account. There are sufficient funds in the Special Account to meet these payments until the close of this policy year, March 1, 1961.

In the agreement entered into on August 19, 1960 by the Eleven Co-operating Railway Labor Organizations with the Carriers' Conference Committees, the Health and Welfare Program is improved, effective March 1, 1961, to provide the same benefits for dependents as the employes receive except for home and office calls, and it also provides coverage for furloughed employes and their dependents for an additional three months. It further provides for a Group Life Insurance Policy for each covered employe of $4,000, effective as of March 1, 1961. The agreement with the Carriers provides that our policy with The Travelers Insurance Company will be amended accordingly.

The new premiums to be paid by the railroads beginning with February 1961 (premiums are paid in one month for benefits in the following month) are as follows:

> On non-hospital railroads the new rate will be $20.31 plus 81¢ for on-duty injuries, plus 70¢ for the additional coverage for furloughed employes and their dependents, or a total of $21.82 per month per employe instead of the $11.05 per month per employe which they are now paying.

The hospital association railroads will pay Travelers $12.73 for dependent coverage and group life insurance for the employe, plus 38¢ for coverage of dependents of furloughed employees for the additional period, or a total of $13.11 per month per employe instead of the $4.25 per month per employe which they are now paying. In addition the hospital association railroads are required to pay up to $7.58 for employe coverage, plus up to 81¢ for on-duty injuries, or a total of $8.39 per month per employe. The hospital association railroad is also required to make arrangements with the Hospital Association on its railroad to take care of the furloughed employes for the additional period of three months.

In other words, the increased cost to all railroads, whether non-hospital or hospital association railroads, is $10.77 per month per employe, $9.96 of which is considered to be in lieu of a wage increase in early 1961 and 81¢ for on-duty injury coverage which is considered a carrier liability.

I am attaching hereto a copy of the agreement of August 19, 1960 which details these changes.

This information is furnished you so that it will be available to you in your current negotiations with the carriers. It will be necessary for all organizations representing employes covered by GA-23000, as amended and expanded, to make similar arrangements for these increased premiums beginning with the month of February 1961 (for benefits beginning March 1, 1961) which are necessary to carry this insurance.

Our Special Account will be so reduced at the end of this policy year that we will be unable to pay any portion of the premiums from that account after January 1961.

Please acknowledge receipt and advise your understanding.

Fraternally yours,

/s/ G. E. Leighty
Chairman
Employes' National Conference
Committee Cooperating
Railway Labor Organizations

Enclosure

NATIONAL RAILWAY LABOR CONFERENCE

Washington, D.C.
March 26, 1964

Mr. Louis J. Wagner, President
Order of Railway Conductors and Brakemen
O.R.C. & B. Building
Cedar Rapids, Iowa

Mr. Charles Luna, President
Brotherhood of Railroad Trainmen
Standard Building
Cleveland 13, Ohio

Gentlemen:

This confirms the understanding we have reached with your representatives, in negotiations on a health and welfare plan to cover employees your organizations represent, as to the handling of on-duty injuries matters.

We understand that the cost of the on-duty injuries factor will be paid from the monies which have been set aside by the Carriers as result of compensated service rendered during the months of January and February, 1964. The "on-duty injuries cost factor" is the amount bid by the insurance companies. We do not anticipate that it will exceed $1.00 per employee per month, but the factor cannot be definitely fixed until insurance proposals are received.

(a) "The above shall apply for a 24-month period commencing on the date the Policy becomes effective." This is stated in paragraph 2(d) of the Memorandum of March 26, 1964.

(b) "The entire $23.00 shall be paid into the escrow fund for the months of January, February and March, 1964." This is stated in paragraphs 2(d) and 2(e) of the Memorandum of March 26, 1964.

(c) "The carriers shall supply the Committee with an accounting of the monies paid in escrow by the carriers for the months of January, February and March, 1964." We understand that the reports which the insurance company is to furnish will meet this specification.

(d) "The Carriers shall definitely assume the entire cost of the on-duty injuries cost factor after the expiration of the initial two-year Policy." This is in accordance with our understanding.

(e) "A separate accounting shall be kept of the experience of the on-duty injuries cost factor, also, the amount of credit to the fund in the form of interest and other accruals." This is in accordance with our understanding, as set forth in paragraph 2(d) of the Memorandum.

(f) "In the event the on-duty injuries cost factor does not consume the entire amount of the monies which was set aside during the months of January and February, 1964, the monies remaining in that fund shall remain a part of the basic reserve of the Health and Welfare Program." This is in accordance with our understanding.

(g) "All of the above shall be reduced to writing." This letter carries out this portion of our understanding.

"Any understanding reached in connection with the above shall in no way relieve the carriers of their responsibility as set forth in the Federal Employers' Liability Act." This is in accordance with our understanding.

Will you please acknowledge receipt of this letter and its correctness as an expression of our understanding.

/s/ [Illegible]
Chairman
National Railway Labor
Conference

/s/ [Illegible]
Chairman
Eastern Carriers' Conference
Committee

/s/ [Illegible]
Chairman
Western Carriers' Conference
Committee

/s/ [Illegible]
Chairman
Southeastern Carriers'
Conference Committee

ACCEPTED:
ORDER OF RAILWAY
CONDUCTOR & BRAKEMEN

/s/ L. J. Wagner
President

/s/ G. H. Harris
Senior Vice President

/s/ C. H. Anderson
General Secretary and Treasurer

/s/ T. M. Walters
Vice President

/s/ [Illegible]
Chairman, Executive Committee

BROTHERHOOD OF
RAILROAD TRAINMEN

/s/ C. Luna
President

/s/ R. E. Severt
Chairman, H. & W. Committee

/s/ R. E. Carroll
Secretary, H. & W. Committee

/s/ R. C. Jordan
Member, H. & W. Committee

/s/ John L. Penderson
Member, H. & W. Committee

NATIONAL RAILWAY LABOR CONFERENCE
1225 Connecticut Avenue, N.W.
Washington, D.C. 20036
Area Code: 202-659-9320

March 12, 1975

Mr. John Peterpaul
General Vice President
International Association of Machinists
and Aerospace Workers
Room 814, Machinists Building
1300 Connecticut Avenue, N. W.
Washington, D. C. 20036

Dear Mr. Peterpaul:

As I indicated during our recent discussions respecting health and welfare and related matters, while the carriers are prepared to continue the present benefits provided under Group Policy Contract GA-23000 for a three-year period commencing January 1, 1975, that willingness is conditioned upon the policyholder labor organizations' agreeing to certain changes designed to avoid unnecessary expense without affecting the benefits to the employees or participation of the organizations in the administration of this program.

The changes are:

1. Agreement by the organizations to expeditious use of the amounts in the Special Account to offset premium payments, with the objective of maintaining the necessary balance in the Account consistent with the assurance of continued Medicare premium payments.

2. Agreement in principle to adoption of a premium-plus-account approach to funding GA-23000, provided that further thorough exploration confirms the advice given us jointly by Travelers that the

interests of the Policyholder will not be adversely affected.

3. Inclusion of a subrogation provision similar to that included in the supplemental sickness benefits agreement between the carriers and the Machinists' and certain other organizations.

What we have in mind, as a typical case, is this:

An employee is injured on duty. He sues the employer for $10,000, and includes in his claim $1,000 of medical expenses which have already been paid under GA-23000. If he wins the suit, he should collect $9,000, not $10,000, for otherwise he would be collecting twice for the same thing.

Our understanding is that, in light of the terms agreed to by the carrier, on behalf of your organization you do not object to these changes, but that you do not purport to speak for any other organizations.

If you concur, would you please sign below.

WILLIAM H. DEMPSEY
Yours very truly,
/s/ W. H. Dempsey

/s/ John Peterpaul